LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 21 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963
No. 639

STUART ARONOFF; JASON and ILEYEN BERNIE; GLORIA BOYD; ALTHEA G. CASE; CLIFFORD R. GANS; NATHAN and IDA FRANKLIN; BUD CHARLES GORE and PHYLLIS GORE; MAX and TURA KLEIGER; SAMUEL ROBINSON and ANNA ROBINSON; HYMEN SMITH and SEVERT SMITH; MARTIN SIRODY and KATHRYN SIRODY; CLYDE E. and MARY JO SHIELDS; HARRY M. SUGARMAN and MARY SUGARMAN; MAX STEIN and FAY STEIN; ROY C. TROEGER and VIRGINIA RUFF TROEGER; RICHARD H. and PATRICIA TROEGER; HARLAND and IRENE WEIR;

Appellants,

vs.

FRANCHISE TAX BOARD of the State of California; STATE BOARD OF EQUALIZATION; JOHN W. LYNCH; GEORGE E. REILLY, PAUL R. LEAKE; RICHARD NEVINS and ALAN CRANSTON as members of the State Board of Equalization,

Appellees.

Appeal From the Supreme Court of the State of California.

APPELLANTS' JURISDICTIONAL STATEMENT.

THOMAS W. LESAGE,
61 South Lake Avenue,
Pasadena, California,
Counsel for Appellants.

SUBJECT INDEX

	Page
The opinion below	1
Jurisdiction	2
Questions presented	5
Statement	8
The federal questions are substantial	12
1. The dangerous and novel, but plain implications of the statute	12
2. The California law impairs due process and other constitutional guaranties	15
Conclusion	20

INDEX TO APPENDICES

Appendix A—Opinion of the Supreme Court of the State of California	1
Appendix B—Notice	8
Appendix C—Excerpt from proceedings at the protest hearing before the Franchise Tax Board (See p. 13 of Petition for Writ)	11
Appendix D—Excerpt from proceedings before the State Board of Equalization (See p. 18 of Memorandum of Points and Authorities attached to original Petition for Writ)	12

TABLE OF AUTHORITIES CITED

Cases	Page
Aronoff et al. v. Franchise Tax Board et al., 60 A. C. 123, 383 P. 2d 409	1
Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746	18
Cohen v. Hurley, 366 U. S. 117	18
Cole v. Arkansas, 333 U. S. 196, 92 L. Ed. 644	20
De Jonge v. Oregon, 299 U. S. 353, 81 L. Ed. 278	20
Kennedy v. Mendoza-Martinez, 9 L. Ed. 2d 644	17
Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. Ed. 1102	3, 18
Lipke v. Lederer, 259 U. S. 557, 66 L. Ed. 1061	15, 17, 18
Madruga v. Superior Court, 346 U. S. 556, 98 L. Ed. 290	3
McFarland v. American Sugar Ref. Co., 241 U. S. 79, 60 L. Ed. 899	15
Mount Vernon-Woodbury Cotton Duck Co. v. Alabama I. P. Co., 240 U. S. 30, 60 L. Ed. 507	3
N.A.A.C.P. v. Alabama, 357 U. S. 449, 2 L. Ed. 2d 1488	3
Robinson v. California, 370 U. S. 660, 8 L. Ed. 2d 758	20
Schur v. Santa Monica, 47 Cal. 2d 11, 300 P. 2d 831	5, 8, 9
Speiser v. Randall, 357 U. S. 513, 2 L. Ed. 2d 1460	3, 9, 10, 15, 16, 17
Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, 79 L. Ed. 1054	19
Thompson v. Louisville, 362 U. S. 199, 4 L. Ed. 2d 654	20

Page

Tot v. United States, 319 U. S. 463, 87 L. Ed. 1519 18

Trop v. Dulles, 356 U. S. 86, 2 L. Ed. 2d 630 20

United States v. Kahringer, 345 U. S. 22, 97 L. Ed. 754 .....19, 21

United States v. Lovett, 328 U. S. 303, 90 L. Ed. 1252 19,

United States v. Sanchez, 340 U. S. 42, 95 L. Ed. 47 18

Statutes

California Constitution, Art. XIII, Sec. 15 .....4, 6

California Penal Code, Sec. 319 13

California Penal Code, Sec. 337 .....3, 12, 13

California Penal Code, Sec. 337(c) 3

California Penal Code, Sec. 337.7 3

California Penal Code, Sec. 377(b) 3, 12

California Revenue and Taxation Code, Sec. 17297 .....1, 2, 3, 5, 6, 7, 9, 12, 13, 14, 19

California Revenue and Taxation Code, Sec. 17359 .....3, 9

California Revenue and Taxation Code, Sec. 18595 11

California Revenue and Taxation Code, Sec. 19081 .....4, 6

Santa Monica City Ordinance, No. 4226 8

Statutes of 1951, Chap. 232, Sec. 1, p. 496 4

Statutes of 1943, Chap. 659, Sec. 1, p. 2407 4

Statutes of 1955, Chap. 939, Sec. 2, p. 1691 3

Statutes of 1955, Chap. 1707, Sec. 1, p. 3141 4

United States Code, Title 28, Sec. 1257(2) 2

Page

United States Constitution, Art. I, Sec. 10 7

United States Constitution, Fourth Amendment .. 18

United States Constitution, Fifth Amendment 6, 17, 18

United States Constitution, Eighth Amendment .. 7

United States Constitution, Fourteenth Amendment 18

United States Constitution, Fourteenth Amendment, Sec. 1 ..... 5, 6, 7

Textbook

1 Stephen, History of the Common Law of England, pp. 487-488 19

IN THE

Supreme Court of the United States

October Term, 1963
No. .....

STUART ARONOFF, *et al.*,

Appellants,

vs.

FRANCHISE TAX BOARD of the State of California, *et al.*,

Appellees.

APPELLANTS' JURISDICTIONAL STATEMENT.

Appellants submit herewith their statement, particularly defining the basis upon which this Court has jurisdiction upon Appeal, to review the final Order and Judgment of the Supreme Court of California denying an original Petition for Writ of Prohibition, discharging alternative Writ and Restraining Order. In denying the Petition the California Court upheld alleged tax assessments under Section 17297 of the Revenue and Taxation Code of the State of California.

The Opinion Below.

The Opinion of the Supreme Court of the State of California has not been finally reported. A copy of the Opinion is attached hereto as Appendix A. Advance report citations are *Aronoff et al. v. Franchise Tax Board et al.* (July 18, 1963), 60 A. C. 123, 383 P. 2d 409.

Jurisdiction.

1. This is an appeal by the named appellants from an Order of the Supreme Court of California denying original Petition for Writ of Prohibition seeking to void proposed assessments of additional personal income taxes pursuant to Section 17297 of the Revenue and Taxation Code of the State of California.

2. The Supreme Court of California handed down its Opinion on July 18, 1963. Theretofore, an Order to Show Cause and temporary Restraining Order had been issued. These Orders were discharged. Appellants' Petition for Rehearing in the California Supreme Court was filed on August 1, 1963 and denied on August 14, 1963. Notice of Appeal to this Court was filed by the named Appellants with the Clerk of the Supreme Court of California on the 14th day of October, 1963.

3. The jurisdiction of this Court upon appeal is conferred by 28 U. S. C. Section 1257(2). Appellants challenge the validity Section 17297 of the Revenue and Taxation Code of the State of California; and the Notice of Proposed Additional Assessment of Tax issued *ex parte* by the Franchise Tax Board of the State of California based upon Section 17297; and California Law relegating Appellants to refund actions, all a "statute of a state" within the meaning of 1257(2), on the ground that as applied to their businesses, it is repugnant to the Constitution of the United States; and the decision of the California Supreme Court was in favor of validity.

4. Cases believed to sustain the jurisdiction of this Court on Appeal include:

Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. ed. 1102;

Speiser v. Randall, 357 U. S. 513, 2 L. ed. 2d 1460;

Mount Vernon-Woodbury Cotton Duck Co. v. Alabama I. P. Co., 240 U. S. 30, 60 L. ed. 507;

N.A.A.C.P. v. Alabama, 357 U. S. 449, 2 L. ed. 2d 1488;

Madruga v. Superior Court, 346 U. S. 556, 98 L. ed. 290.

5. Section 17297 of the Revenue and Taxation Code of the State of California (formerly Section 17359) provides as follows:

> "In computing taxable income, no deductions shall be allowed to any taxpayer on any of his gross income derived from illegal activities as defined in Chapters 9, 10 or 10.5 of Title 9 of Part 1 of the Penal Code[1] of California; nor shall any deductions be allowed to any taxpayer on any of his gross income derived from any other activities which tend to promote or to further, or are connected or associated with, such illegal activities."
>
> (Added Stats. 1955. c. 939, p. 1691, §2, effective June 6, 1955. Former Section 17359, added by

[1]Chapters 9, 10, 10.5 deal generally with misdemeanors. However *Felony* offenses are also included. See for example Sections 337, 337b, 337c, 337.7 of the California Penal Code.

Stats. 1951, c. 232, p. 496, §1, effective May 3, 1951, contained indentical provisions except that it referred to computing "net income", instead of "taxable income")

6. Section 19081 of the Revenue and Taxation Code of the State of California so far as relevant here provides:

> "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of this State to prevent or enjoin the assessment or collection of any tax under this part;"
>
> (Added Stats. 1943, c. 659, p. 2407, § 1, as amended Stats. 1955, c. 1707, p. 3141, § 1.)

7. Article XIII, Section 15 of the California Constitution so far as relevant here, provides:

> ". . . No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of this article; but after payment thereof action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected."

8. The Notice of Additional Income Taxes Proposed to be Assessed issued on March 15, 1955 (applicable to the years 1951, '52, '53 and '54) to Appellant Roy C. Troeger is fairly illustrative; a copy of said Notice is attached hereto as Appendix B.

9. Only the named Appellants present this Appeal. Certain of the Petitioners in the original Petition for Writ of Prohibition before the California Supreme Court do not join in this Appeal.

In the case of *Schur v. Santa Monica,* 47 Cal. 2d 11, 300 P. 2d 831, the California Supreme Court reversed a trial court judgment adverse to the Appellants here. *Schur* did not discuss or involve the tax issues here presented but does review the Santa Monica Municipal ordinances and the findings of the City Council of Santa Monica approving the taxpayers' game and ordering issuance of business licenses and police permits.

Questions Presented.

The Notice (Appendix B) of Additional Tax Proposed to be Assessed issued *ex parte* without prior Notice or hearing, accusation or statement of charges and applied retroactively. The Notice based on Section 17297 denied all business deductions and impliedly (but not expressly) adjudged Appellants guilty of unspecified felonies and misdemeanors as "illegal activities". Under California law the Notice is presumed correct and the burden is thereupon placed upon the taxpayer to rebut the presumption of criminal guilt thus established before administrative bodies and in court, by refund actions. Therefore the following questions are respectfully submitted:

1. Whether Revenue and Taxation Code Section 17297 and the Notice of Assessment based thereon denied due process of law under the Fourteenth Amendment (Section 1) of the Constitution of the United States,—

(a) By replacing the presumption of innocence with a presumption of criminal guilt founded upon a secret administrative notice;

(b) By requiring the taxpayer thus presumed guilty of an unspecified crime, to assume the burden of proof and re-establish his innocence before administrative bodies and in court, after payment of the assessment;

(c) By denying all business deductions and thereupon imposing excessive and unreasonable fines, penalties and forfeitures for criminal conduct under the pretense of the assessment of a civil tax but without prior criminal or civil judicial trial;

(d) By withdrawing all civil remedies by injunction, prohibition mandamus or other extraordinary relief to restrain the unconstitutional imposition of such criminal penalties under the pretense of the assessment of a civil tax. (Revenue and Taxation Code Section 19081 and Article XIII, Section 15 of the California Constitution.)

2. Whether Section 17297 of the Revenue and Taxation Code of the State of California as written, construed and applied impairs the privilege against self-incrimination conferred by the Fifth Amendment to the Constitution of the United States acting as a restraint upon the States by the Fourteenth Amendment (Section 1)—

(a) By requiring or necessitating the testimonial disclosure by the taxpayer of acts already committed of an alleged criminal nature;

(b) By inferring a substantiation of the implied charge of criminal guilt in the event of the taxpayers' refusal to testify.

3. Whether Revenue and Taxation Code Section 17297 as written, construed and applied, by sanctioning assessment of irrational and disproportionate penalties for misdemeanors impairs the Eighth Amendment of the Constitution of the United States prohibiting cruel and unusual punishment as such Amendment acts as a restraint on the States under the Fourteenth Amendment, Section 1.

4. Whether Section 17297 impairs due process of law in its reference to felonies and misdemeanors as "illegal activities" and "other activities, which tend to promote, or to further, or are connected or associated with such illegal activities", such reference being insufficient to inform citizens of average intelligence what criminal acts it declares punishable.

5. Whether Section 17297 as written, construed and applied impairs due process of law and the equal protection of the laws under the Fourteenth Amendment, Section 1, to the United States Constitution by imposing a levy on gross receipts computed at the same rate of tax as the income tax liability of taxpayers generally.

6. Whether Section 17297 as written, construed and applied to allow secret *ex parte* administrative determination that felonies and misdemeanors have been committed violates due process of law and the provisions of Article I, Section 10 of the Constitution of the United States in taking away property without trial or prior hearing, without accusation, right of confrontation, in subverting the presumption of innocence and redrawing the traditional rules of criminal evidence and in being a bill of attainder.

Statement.

From May 23, 1951 (and prior thereto) to October 5, 1954 Appellants operated or had financial interests in business establishments publicly operated on the beach walks, streets and piers of the recreation zone of the City of Santa Monica known as Ocean Park. The City of Santa Monica had issued to Appellants' business licenses and police permits authorizing Appellants to conduct at their places of business a game known as "Skill Ball". The licenses and permits were issued pursuant to Section 4226 and related sections of the Municipal Code of the City of Santa Monica.

The City Council of the City of Santa Monica, by public hearing in August of 1954 held pursuant to Ordinance 4226, unanimously approved Appellants' games.

The California Supreme Court, in *Schur v. Santa Monica*, 47 Cal. 2d 11, 300 P. 2d 831, held the findings of the City Council not subject to review *de novo* in the Superior Court, and reversed a contrary trial court decision.

While, as noted, the games were operated at locations most available to the beach-going public, no indictments etc. have ever been lodged against them.

We must presume that a vigilant and able district attorney, and other law enforcement officers, would not have countenanced the public maintenance of appellants' games over many years, had they, in the opinion of the law enforcement officers, been conducted in violation of any penal law.

Appellants filed partnership and personal income tax returns under the California Income Tax law for the years 1951, 1952, 1953 and 1954. The Franchise Tax

Board did not challenge on any relevant grounds the returns as filed. However in 1955 and after the decision of the trial court reversed in *Schur v. Santa Monica,* 47 Cal. 2d 11 Appellants received a Notice of Additional Income Tax Proposed to be Assessed (Appendix B). The Notice proposed to adjust the income tax liability of Appellants for the years 1951, '52, '53 and '54 by denying *all* usual business deductions under the authority of Section 17297 (then 17359) of the California Revenue and Taxation Code. The 1955 Notice impliedly (but not expressly) concluded that Appellants had been engaged in "*illegal activities*" during the years 1951, '52, '53 and '54 but the Notice did not specify any facts in support of the claim of "illegal activities" nor did the Notice specify what felonies and misdemeanors embraced within Chapters 9, 10 and 10.5 of the California Penal Code, Appellants had violated.

The Notice was based upon undisclosed information known only to the Franchise Tax Board. The *ex parte* nature of the Franchise Tax Board's assessment is confirmed in their Answer to Petition for Writ of Prohibition where it is alleged:

> "In that regard, respondents allege that the Franchise Tax Board's proposed assessments were based on the board's conclusion on the basis of all information available to it that the games in question were games of chance and violative of the Penal Code." (Par. VI, p. 4.)

The Franchise Tax Board contends here, as it erroneously did in *Speiser v. Randall,* 357 U. S. 513, 2 L. ed. 2d 1460, that the Notice of Assessment places upon the taxpayer the affirmative burden of proof in court, as well as before the taxing authorities, to negate

the Board's implied finding of criminal guilt. The Franchise Tax Board has declared its position:

> "It is well settled that in an appeal to the Board of Equalization, the proposed deficiency assessment is given the legal status of being prima facie correct and that the burden is on the taxpayer to show error and the amount of such error." (See also *Speiser*, 357 U. S. 513 at p. 521.)

The Proposed Assessments are enormous, aggregating in excess of $700,000.00 principal and interest, as against the named Appellants. The proposed Assessment against the taxpayer Appellants had no relationship to their regular and ordinary tax. For example, the regular tax liability of Appellants Roy and Virginia Troeger before the proposed additional assessment was $493.25. The Proposed Additional Assessment against Troegers was $32,383.87[2] inclusive of interest.

Appellants filed a written protest and, pursuant to California law, the Protest hearing was held before the Franchise Tax Board on April 30, 1959. At the Protest hearing before the Franchise Tax Board on April 30, 1959 the taxing officials declared that the purpose of the hearing was to receive from Appellants "any information or evidence as to why these games should not be considered to be games of chance."[3]

The Franchise Tax Board denied the Protest and thereafter, as permitted by California law, Appellants appealed to the State Board of Equalization. A hearing was held before the Equalization Board on August

---

[2]See pages 9 and 10 of Petition for Writ listing proposed assessments (exclusive of interest) against Appellants.

[3]Proceedings at the Protest hearing are part of the record. Excerpt is attached as Appendix C.

17 and 18, 1961. On September 20, 1962 the State Board of Equalization, pursuant to Section 18595 of the California Revenue and Taxation Code affirmed the action of the Franchise Tax Board which, as has been stated, denied the Protest of the Appellants.

At the hearing before the State Board of Equalization the Board ruled that the failure of Appellant taxpayers to testify as witnesses would be held by the Board as evidence in support of the "factual allegations."[4]

On October 15, 1962 Appellants and other taxpayers who have not joined in this Appeal, filed an original Petition for Writ of Prohibition in the Supreme Court of the State of California.

Thereafter the Petition was transferred to the Third District Court of Appeal for the State of California and that Court issued an Order to Show Cause and Temporary Restraining Order. Thereafter and before decision the cause was re-transferred to the California Supreme Court where it was heard and argued *en banc*. On July 18, 1963 the Petition for Writ of Prohibition was denied and the Order to Show Cause and Temporary Restraining Order discharged.

Appellants throughout these proceedings have urged the Federal questions here restated. They were urged at the Protest hearing before the Franchise Tax Board; at the hearing before the State Board of Equalization; in the Petition for Writ of Prohibition and the Additional Memorandum of Points and Authorities filed with the Supreme Court of California; in the oral arguments before the District Court of Appeal and *en banc*

---

[4]Proceedings before the State Board of Equalization are part of the record. Excerpt is attached as Appendix D.

before the California Supreme Court and in the Petition for Rehearing filed with the California Supreme Court.

The Federal Questions Are Substantial.

1. The Dangerous and Novel, but Plain Implications of the Statute.

Revenue and Taxation Code 17297 includes, within the classification of "illegal activities", both felonies and misdemeanors. Thus, Penal Code 377b[5] punishes any person who bribes or attempts to bribe a participant in any sporting event (except a wrestling exhibition) such as baseball, football, basketball, boxing or horse racing with a fine of not exceeding $5,000.00 or imprisonment not exceeding 5 years or both said fine and imprisonment and this offense is a felony.

Section 337[6] of the California Penal Code, also included within the ambit of "illegal activities", reads as follows:

> "Every state, county, city, city and county, town or judicial district officer, or other person who shall ask for, receive, or collect any money, or other valuable consideration, either for his own or the public use, for and with the understanding that he will aid, exempt, or otherwise assist any person from arrest or conviction for a violation of Section 330 of the Penal Code; or who shall issue, deliver, or cause to be given or delivered to any person or persons, any license, permit, or other privilege, giving, or pretending to give, any au-

---

[5]Penal Code 337b is included within Ch. 10 of Title 9 of Part 1 of the California Penal Code.

[6]Penal Code 337 is included within Ch. 10 of Title 9 of Part 1 of the California Penal Code.

thority or right to any person or persons to carry on, conduct, open, or cause to be opened, any game or games which are forbidden or prohibited by section 330 of said code; and any such officer or officers who shall vote for the passage of any ordinance or by-law, giving, granting, or pretending to give or grant to any person or persons any authority or privilege to open, carry on, conduct, or cause to be opened, carried on, or conducted, any game or games prohibited by said section 330 of the Penal Code, is guilty of a felony." (Section 337.)

It is a curiosity that apparently under Penal Code 337, members of the Santa Monica City Council (if the Franchise Board is correct), are subject to assessments under 17297 because of its action in approving appellants' games at the public hearing in August, 1954.

The Statute (17297), therefore, which this Court is called upon to consider, deals with the gravest crimes known to the criminal law, and, presumably, may be applied by the taxing authorities as penalties in addition to those prescribed by the Penal Code.

While the notice of proposed assessment (Appendix B) directed to the Appellant taxpayers here did not specify what Section of the California Penal Code they were accused of violating and, while as we have noted, Chapters 9, 10, 10.5 include many different types of offenses, misdemeanor and felony, the Board, by their briefs and at the hearing, have made it clear that Appellants are accused of the misdemeanor of operating a lottery—apparently in violation of Section 319 of the California Penal Code.

If Revenue and Taxation Code 17297 may constitutionally apply to the numerous felonies and misdemeanors of three Chapters of the California Penal Code, there is no reason why it may not apply to the entire Penal Code and all penal offenses.

If we may determine who are criminals by means of administrative notice in order to deny tax deductions, there is no reason why administrative notice may not be urged as a basis for determining who are to be imprisoned. What is essentially wrong with a Statute so simple and forthright? A fatal and dangerous error in such a Statute is that it violates the presumption of innocence and rules of evidence which are the foundation of our tradition of law.

The California Law then expresses a novel and alien philosophy pertaining both to felonies and misdemeanors, which may be summarized as follows:

> *All deductions, exemptions and privileges created by the State can be denied where there has been a violation of any section of the Penal Code as enacted by the California Legislature. The determination of whether or not a crime has been committed shall be within the sole discretion of the administrative body with the burden of proof upon the citizen. The discretion of the administrative body may be exercised by ex parte notice. Any injunctive procedures are prohibited since such denial is hereby designated a tax.*

2. The California Law Impairs Due Process and Other Constitutional Guaranties.

The heart of the California decision is the holding that "The due process clause does not guarantee the right to judicial review of tax liability before payment." (60 A. C. p. 126.)

We do not deny that ordinarily a tax refund suit satisfies due process in a tax proceeding. We do deny that a refund action is adequate where in addition to a question of monetary tax liability there is premised the essential and formal issue of criminal guilt. (*Lipke v. Lederer*, 259 U. S. 557, 66 L. ed. 1061.)

Thus, where the "tax" is, in truth, a criminal penalty —punishment for the commission of a crime—federal due process peremptorily rejects prior tribute as a condition to judicial intervention. (*Lipke v. Lederer*, 259 U. S. 557, 66 L. ed. 1061.)

Where taxing procedures result in the suppression of sacred constitutional rights such as free speech, or impose criminal guilt by administrative decree or by the *per se* effect of statutes or impose criminal guilt practically by the unfair shifting of the burden of proof, due process is not stultified because of the name "tax" and refund actions are rejected. (*Speiser v. Randall*, 357 U. S. 513, 2 L. ed. 2d 1460; *Lipke v. Lederer*, 259 U. S. 557, 66 L. ed. 1061.)

> "However designated 'It is not within the province of a [state] legislature to declare an individual guilty or presumptively guilty of a crime.'" (Holmes J. in *McFarland v. American Sugar Ref. Co.*, 241 U. S. 79, 60 L. ed. 899, 904.)

We invoke the analysis of *Speiser:*

"It is, of course, familiar practice in the administration of a tax program for the taxpayer to carry the burden of introducing evidence to rebut the determination of the collector. Phillips v. Dime Trust & S.D. Co. 284 US 160, 167, 76 L ed 220, 224, 52 S Ct 46; Brown v. Helvering, 291 US 193, 199, 78 L ed 725, 730, 54 S Ct 356. But while the fairness of placing the burden of proof on the taxpayer in most circumstances is recognized, this Court has not hesitated to declare a summary tax-collection procedure a violation of due process when the purported tax was shown to be in reality a penalty for a crime. Lipke v. Lederer, 259 US 557, 66 L ed 1061, 42 S Ct 549; cf. Helwig v. United States, 188 US 605, 47 L ed 614, 23 S Ct 427. *The underlying rationale of these cases is that where a person is to suffer a penalty for a crime he is entitled to greater procedural safeguards than when only the amount of his tax liability is in issue.* Similarly it does not follow that because only a tax liability is here involved, the ordinary tax assessment procedures are adequate when applied to penalize speech."

"It is true that in the present case the appellees purport to do no more than compute the amount of the taxpayer's liability in accordance with the usual procedures, but in fact they have undertaken to determine whether certain speech falls within a class which constitutionally may be curtailed." (357 U. S. 525.)

Here, too, the Franchise Tax Board purports to do no more than compute the taxpayers liability in accordance with the usual procedures but in fact the Board has undertaken the task of the District Attorney—to determine whether past conduct violates the California Penal Code—unfettered by jury or judge, the presumption of innocence, the necessity for accusation, the guarantee of the Fifth Amendment and with the burden of proof on the accused.

> "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the *first step* in such a procedure." (*Speiser*, 357 U. S. 529.)

Speiser holds Appellants are "not obliged to take the first step" *i.e.*, seek administrative relief. How then may California require them to take the final step—a final step where they must assume the novel burden of persuading the courts to hold them *not* guilty of criminal conduct over a past period of four years; and then only on the odious condition that tribute first be paid?

Where a "tax" assessment in truth is an assessment of a criminal penalty, so-called anti-injunction enactments may not constitutionally impair direct access to the courts. (*Lipke v. Lederer*, 259 U. S. 557, 66 L. ed. 1061.).

Where legislation imposes a punishment or penalty "*the availability after the fact of administrative and judicial proceedings . . . to contest the validity of the sanction*" does not satisfy federal due process. (*Kennedy v. Mendoza-Martinez*, 9 L. ed. 2d 644, 660.)

The mere use of the word "tax" or "deduction" is of little significance. This Court, in passing on the Constitutionality of a state tax is "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." (*Lawrence v. State Tax Commission*, 286 U. S. 276, 280, 76 L. ed. 1102, 1106.) (See also *Lipke v. Lederer*, 259 U. S. 557, 66 L. ed. 1061.)

Tax suits seeking penalties for crime, even though civil in form, are of a criminal nature and "are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declare that no person shall be compelled in a criminal case to be a witness against himself." (*Boyd v. United States*, 116 U. S. 616, 634, 29 L. ed. 746; *Compare United States v. Sanchez*, 340 U. S. 42, 95 L. ed. 47.)[7]

The necessity has thus arisen to answer the question of Mr. Justice Black in *Tot v. United States*, 319 U. S. 463, 473, 87 L. ed. 1519:

> "It is unnecessary to consider whether this statute, which puts the defendant against whom no evidence of guilt has been found in a procedural situation from which he can escape conviction only by testifying, compels him to give evidence against himself in violation of the Fifth Amendment."

---

[7]We recognize that it is not yet held that the privilege against self-incrimination guaranteed by the Fifth Amendment is absorbed by the Fourteenth Amendment. See concurring and dissenting opinions in *Cohen v. Hurley*, 366 U. S. 117. However in the context of this case, disregard of the privileges against compulsory self-incrimination contribute measurably to the "fundamental unfairness" of the entire procedures and must be evaluated.

In *United States v. Kahringer*, 345 U. S. 22, 97 L. ed. 754 this court acquiesced in an act of Congress construed not to compel disclosure of "acts already committed" (p. 32). The statute here, as enforced, compels the disclosure of acts already committed if the taxpayers are ever to overcome the presumption of guilt attached to the notice of assessment.

Other egregious constitutional errors inhere in this proceeding.

Revenue Code 17297 as administered is a legislative bill of attainder since, as held in *United States v. Lovett*, 328 U. S. 303, 315, 90 L. ed. 1252 "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

A gross receipts levy computed as it is here, at the rates applicable to income taxpayers generally and by the same procedures and by the same law is the clumsiest form of unconstitutional discrimination. (*Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 79 L. ed. 1054.)

At common law conviction of a felony worked a forfeiture of the felon's real property on the theory of "corruption of blood". His personal property was forfeited not by his attainder but by his conviction. (Stephen, *History of the Common Law of England*, Vol. 1, pp. 487-488.) The enormous penalties imposed on the taxpayers here as misdemeanants is a fearful if modern revival of the "corruption of blood" theory. Clearly, however, the proposed levy, being out of all proportion to the offense is void as cruel and unusual

punishment in the Constitutional sense. (*Trop v. Dulles,* 356 U. S. 86, 2 L. ed. 2d 630.)

The Statutory expressions "illegal activities" and "other activities which tend to promote or further, or are connected or associated with such illegal activities" are clearly meaningless as a measure of criminal acts and are thus void under the Fourteenth Amendment.

If by use of the expression "illegal activities" something other than specific criminal conduct is intended the Statute is void. (*Robinson v. California,* 370 U. S. 660, 8 L. ed. 2d 758.)

The Notice having issued *ex parte,* and without support of prior evidence is void.

> "Just as 'Conviction upon a charge not made would be sheer denial of due process', so is it a violation of due process to convict and punish a man without evidence of his guilt." (*Thompson v. Louisville,* 362 U. S. 199, 4 L. ed. 2d 654; *De Jonge v. Oregon,* 299 U. S. 353, 362, 81 L. ed. 278, 282; *Cole v. Arkansas,* 333 U. S. 196, 201, 92 L. ed. 644, 647.)

Conclusion.

Appellants respectfully urge that this appeal brings before this Court Federal questions under the Constitution of unprecedented importance, questions so unique and substantial as to require plenary consideration for their resolution.

The rights of those suspected of crime, protected by centuries of constitutional tradition, are threatened with encirclement by a frankenstein taxing power.

We say, however, that when tax law wanders into novel areas such as the *de jure* enforcement of penal codes and suppression of free speech it must expect to sacrifice the immunities of its native habitat and to face exacting judgment before this Court and the Constitution which it guards.

The late Mr. Justice Jackson expressed sentiments in *Kahringer* which we trust shall always prevail:

> "It will be a sad day for the revenues if the goodwill of the people towards their taxing system is frittered away in efforts to accomplish by taxation moral reforms that cannot be accomplished by direct legislation."

Respectfully submitted,

THOMAS W. LESAGE,
Counsel for Appellants.

APPENDIX "A".

Opinion of the Supreme Court of the State of California.

[Sac. No. 7440. In bank. July 18, 1963.]

Stuart Aronoff et al., Petitioners, v. Franchise Tax Board et al., Respondents.

Proceeding in prohibition to restrain the Franchise Tax Board from taking any further steps to collect income taxes assessed against petitioners. Order to show cause discharged and peremptory writ denied.

LeSage & Bowman and Thomas W. LeSage for Petitioners.

Stanley Mosk, Attorney General, Dan Kaufmann, Assistant Attorney General, and Ernest P. Goodman, Deputy Attorney General, for Respondents.

McComb, *J.*—Petitioners seek a writ of prohibition restraining respondents from taking any further steps to collect taxes assessed against them.

Facts: The taxes in question relate to assessments by the Franchise Tax Board of additional personal income taxes based on the disallowance of deductions claimed by petitioners on their California personal income tax returns. The disallowance of the deductions was based on former section 17359 of the Revenue and Taxation Code (now numbered § 17297), prohibiting the allowance of deductions to a taxpayer of any of his gross income from certain designated illegal activities.

Petitioners appealed the assessments of the Franchise Tax Board to the State Board of Equalization. The State Board of Equalization on September 20, 1962, rendered a decision upholding the validity of the

assessments. Petitioners have filed petitions for a rehearing with the State Board of Equalization with respect to such decision, but the petitions have not yet been acted upon by the board.

Respondents' contention that a writ of prohibition is not available to petitioners is correct for these reasons:

First: *The issuance of a writ of prohibition to restrain the collection of personal income taxes under the facts in the instant case is barred by statutory and constitutional provisions in this state.*

Section 19081 of the Revenue and Taxation Code, so far as here relevant, provides: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of this State to prevent or enjoin the assessment or collection of any tax under this part. . . ."

Article XIII, section 15, of the California Constitution provides: ". . . No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of this article; but after payment thereof action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected."

This court in *Modern Barber Colleges, Inc. v. California Emp. Stab. Com.*, 31 Cal.2d 720 [192 P.2d 916], had occasion to consider section 45.11, subdivision (d), of the Unemployment Insurance Act, which section is similar to the statutory provision above quoted. The

court held the constitutional bar contained in article XIII, section 15, to be inapplicable, but nevertheless denied a writ of mandate and upheld the validity of the statutory provision there involved against claims that the taxpayer was being deprived of constitutional rights, stating at page 725 [4a]: "Implicit in the contention that the statute is unconstitutional is the assumption that the petitioner has some constitutional right which can be protected only by mandamus. The petitioner relies strongly on *Laisne v. State Board of Optometry*, 19 Cal.2d 831 [123 P.2d 457]. That case held that under the due process clauses of the federal and California Constitutions, and under the doctrine of separation of powers in our Constitution, the petitioner was entitled to a type of review or administrative activity which, under our practice, mandate alone could provide. But in the present case it is clear that depriving the petitioner of the remedy of mandate would not deprive him of due process of law, and no other constitutional right under which he might claim this particular form of relief has been suggested. *The due process clause does not guarantee the right to judicial review of tax liability before payment.* The power of a state to provide the remedy of suit to recover alleged overpayments as the exclusive means of judicial review of tax proceedings has long been unquestioned. [Citations.]" (Italics added.) (See also *Louis Eckert Brewing Co. v. Unemployment Reserves Com.*, 47 Cal.App.2d 844, 846 [1] [119 P.2d 227]; *Estate of Schneider*, 62 Cal. App.2d 463, 465 [3] [145 P.2d 90]; *Casey v. Bonelli*, 93 Cal.App.2d 253, 254 [1] [208 P.2d 723].)

The taxes involved in the present proceeding are income taxes levied under article XIII, section 11, of the

Constitution. Hence both the statutory bar contained in section 19081 of the Revenue and Taxation Code and the constitutional bar contained in article XIII, section 15, operate to prohibit issuance of the writ prayed for.

Petitioners contend, relying on authorities in other jurisdictions, that there is an exception to the above rule applicable to the facts in the present case, because of the great financial hardship involved. However, this argument is devoid of merit, because in *Modern Barber Colleges, Inc. v. California Emp. Stab. Com., supra,* we held contrary to their argument, saying at page 732: "The petitioner's allegation that payment of the claims asserted against it will render it insolvent is one which could be made against any tax and can have no relevancy in a situation where this court, by express legislative provision, is prohibited from interfering in advance of payment of the tax. The argument that compliance with the statute may cause hardship in some instances is one which can be addressed only to the Legislature."[1]

Second: *Petitioners have failed to exhaust their administrative remedies.*

Section 19082 of the Revenue and Taxation Code provides that after payment of the tax and denial by the Franchise Tax Board of a claim for refund, a taxpayer claiming that the assessment against him was

---

[1]It is interesting to note that in the present case the assessments for 1951 with respect to over half of the petitioners were for less than $100 each and that such amounts could have been paid as early as 1955, after which petitioners could have vindicated their rights in the courts. Since the operations of all petitioners here involved were identical, a test case as to one of the petitioners would have determined the validity of the assessments against all of them.

void, in whole or in part, may bring an action for recovery of all, or part, of the amount paid.

In the instant case petitioners have not paid their tax or filed claims for refund. Accordingly, they have failed to exhaust their administrative remedies before the Franchise Tax Board and are precluded from any court proceeding to test the validity of the tax.

Moreover, at the time the petition for a writ of prohibition was filed, the 30-day period for petitioning the State Board of Equalization for a rehearing was still open. All the taxpayers have petitioned the State Board of Equalization for a rehearing either concurrently with, or subsequent to, the filing of the present petition for a writ of prohibition, but the board has not yet acted on the request for a rehearing. It is thus apparent that even the administrative remedies before the State Board of Equalization have not been fully exhausted by petitioners.

In *Abelleira v. District Court of Appeal,* 17 Cal.2d 280 [109 P.2d 942, 132 A.L.R. 715], a writ of mandate and temporary restraining order against the payment of unemployment benefits under the Unemployment Insurance Act had been issued by the District Court of Appeal. It was there held, at page 291 [5], that the courts of the state are not available to a taxpayer prior to the exhaustion of administrative remedies before the administrative tribunals responsible for the administration of the tax and that the defect of failure to exhaust such remedies was jurisdictional.

In the instant case, petitioners' failure to exhaust their administrative remedies constitutes a jurisdictional barrier to obtaining relief from the courts.

Third: *A writ of prohibition is limited to a restraint of a threatened exercise of judicial power in excess of the jurisdiction of a tribunal, corporation, board, or person exercising judicial functions.*

Section 1102 of the Code of Civil Procedure expressly limits the availability of the writ of prohibition to arrest the exercise of judicial functions in excess of jurisdiction.[2]

In *Whitten v. California State Board of Optometry*, 8 Cal.2d 444, 445 [1] [65 P.2d 1296, 115 A.L.R. 1], this court, in discharging a writ of prohibition to restrain the revocation of a license by the State Board of Optometry, specifically held that the writ of prohibition is limited to the restraint of a threatened exercise of the judicial power in excess of jurisdiction and is not available to stay actions by an administrative agency unless the agency is exercising judicial powers conferred by the California Constitution.

The court pointed out that its prior decision in *Standard Oil Co. v. State Board of Equalization*, 6 Cal.2d 557 [59 P.2d 119], was controlling. That case established, at page 565 [4], that no judicial power has been, or could constitutionally be, conferred upon the State Board of Equalization.

The same restriction applies to the Franchise Tax Board. Accordingly, the writ of prohibition is not available to petitioners herein to restrain the action of either the State Board of Equalization or the Franchise Tax Board.

---

[2]Section 1102 of the Code of Civil Procedure reads: "The writ of prohibition arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person."

In view of our conclusions, it is unnecessary to discuss other questions raised by counsel.

The order to show cause heretofore issued is discharged, and the application for writ of prohibition is denied.

Gibson, *C. J.*, Schauer, *J.*, Peters, *J.*, Tobriner, *J.*, and White, *J.*,* concurred.

*Retired Justice of the Supreme Court sitting pro tempore under assignment by the Chairman of the Judicial Council.

APPENDIX "B".

96125

IT830
In replying refer to
Income Tax Division

Notice of Additional
Personal Income Tax
Proposed to be Assessed

State of California
Office of
FRANCHISE TAX BOARD
Sacramento 14

Roy C. Troeger
4600 Encino Avenue
Encino, California

Date: March 15, 1955

Notice is hereby given that the Income Tax Return of the above-named taxpayer for the taxable period ended December 31, 1953, Serial No. 2719121, has been examined, the correct amount of tax determined by the Franchise Tax Board and it is proposed to assess a deficiency tax in accordance with the provisions of the Personal Income Tax Law, in the amount of $6,658.20. The details of the proposed deficiency assessment and of computing said tax are set forth below.

Amount Subject to Tax per Form 540			$ 21,726.45
Partnership Income	As Shown	$ 4,940.21	
	As Revised	49,546.42	44,606.21
Income from Trusts	As Shown	$ 19,789.31	
	As Revised	86,698.62	66,909.31
Revised additional income of The Blackout and Vogue as shown on attached schedule		$892,124.10	
Taxpayer's 5% interest		44,606.21	
Troeger Trust 15% interest	$133,818.62		
Taxpayer's 50% interest in trust		66,909.31	
Revised Amount Subject to Tax			133,241.97
Total Tax			7,244.52
Previously Assessed			586.32
Additional Tax			6,658.20

The amount of tax must be transmitted to the Franchise tax Board by check or money payable to the Franchise Tax Board. Interest must be added at six per cent per annum from April 15, 1954 to the date of notice and demand or to date of payment, if paid to date of such notice.

This proposed deficiency assessment will become final within sixty days from date hereof, unless a protest in writing is filed with the Franchise Tax Board. See the reverse side of this form.

Interest as called for above must be included in remittance.

FRANCHISE TAX BOARD
John J. Campbell
Executive Officer

LPA:MC:RM—S

The Blackout and Vogue

Serial No. .....
Fiscal Year Ended
May 31, 1953

Schedule I

Ordinary Income per Form 565			$ 83,003.81
Net Income	As Shown	$ 83,003.81	
	As Revised	975,127.91	892,124.10

Cost of prizes	$738,223.05
Expenses	153,901.05
Total disallowance	$892,124.10

This adjustment is made to disallow cost of prizes and other expenses in accordance with Section 17359 California Revenue and Taxation Code.

Revised Ordinary Net Income $975,127.91

APPENDIX "C".

Excerpt From Proceedings at the Protest Hearing Before the Franchise Tax Board (See p. 13 of Petition for Writ).

"Mr. Hanson: *This is a hearing on the protest of Roy C. Troeger for the year 1951.* This issue involved is the legality or illegality of the particular types of games that were conducted by partnerships known as Blackout, and Vogue, and Jade and Cameo.

"Franchise Tax Board investigators have investigated these games, and as a result of their investigations, proposed assessments have been made. The proposed assessments have been protested on the ground that they are not illegal activities, and further that our Section 17359 and Section 17297 are unconstitutional. I believe that constitutes a short statement of exactly what we are concerned with today. We are concerned with the fact that whether these games are games of skill or games of chance. Under the Attorney General's opinion, February 19, 1951, cite 17 Opinion AG 63, the Attorney General held that these various games were lotteries and as such that they came within the Penal Code Sections 219 and 236. *We therefore are here for the purpose of hearing any information or evidence as to why these games should not be considered to be games of chance.*" (Protest Hearing, p. 3.)

APPENDIX "D".

Excerpt From Proceedings Before the State Board of Equalization (See p. 18 of Memorandum of Points and Authorities Attached to Original Petition for Writ).

"Mr. LeSage: *So it would be the official position of the Board, if I understand your explanation, that if our clients in this case might decline to testify on the grounds that it might tend to incriminate them, that the Board would regard this as some evidence in support of the allegations?*

"Mr. Holden: *The factual allegations, not the legal allegations.*

"Mr. LeSage: *That's correct, isn't it?*

"Mr. Holden: *Yes. Well, it would tend to support the factual allegations.*

"Mr. LeSage: *You would draw an adverse conclusion from that that the charges perhaps are true and the allegations are true.*

"Mr. Holden: Yes."

(Transcript of proceedings before State Board of Equalization, p. 20.)

LIBRARY

Office-Supreme Court, U.S.
FILED
DEC 19 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 639

STUART ARONOFF; JASON and ILEYEN BERNIE; GLORIA BOYD; ALTHEA G. CASE; CLIFFORD R. GANS; NATHAN and IDA FRANKLIN; BUD CHARLES GORE and PHYLLIS GORE; MAX and TURA KLEIGER; SAMUEL ROBINSON and ANNA ROBINSON; HYMEN SMITH and SEVERT SMITH; MARTIN SIRODY and KATHRYN SIRODY; CLYDE E. and MARY JO SHIELDS; HARRY M. SUGARMAN and MARY SUGARMAN; MAX STEIN and FAY STEIN; ROY C. TROEGER and VIRGINIA RUFF TROEGER; RICHARD H. and PATRICIA TROEGER; HARLAND and IRENE WEIR; *Appellants,*

vs.

FRANCHISE TAX BOARD of the State of California; STATE BOARD OF EQUALIZATION; JOHN W. LYNCH; GEORGE E. REILLY, PAUL R. LEAKE; RICHARD NEVINS and ALAN CRANSTON as members of the State Board of Equalization, *Appellees.*

Appeal from the Supreme Court of the State of California

Motion to Dismiss or Affirm

STANLEY MOSK
Attorney General of the
State of California

DAN KAUFMANN
Assistant Attorney General

ERNEST P. GOODMAN
Deputy Attorney General

SUBJECT INDEX

	Page
Statement of the Case	2
Statement of Facts	4
The Question Presented	7
Argument	9
No Substantial Federal Question Is Presented in This Case	9
I. There Has Been No Denial to Appellants of Procedural Due Process	9
II. There Has Been No Denial of Substantive Due Process	13
Conclusion	16
Appendix	

TABLE OF AUTHORITIES CITED

Cases	Pages
Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 109 P. 2d 942	4, 7
Asher v. Johnson, 26 Cal. App. 2d 403, 79 P.2d 457	5
Boyd v. United States, 116 U.S. 616	13
Bull v. United States, 295 U.S. 247	3, 9
Commissioner v. Sullivan, 356 U.S. 27	15
Den ex dem. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272	3, 9
Enoch v. Williams Packing Co., 370 U.S. 1	9, 10
Gorham Mfg. Co. v. State Tax Commission, 266 U.S. 265	4, 7
Hetzel v. Franchise Tax Board, 161 Cal. App. 2d 224, 326 P. 2d 11	13, 15
Hodge v. Muscatine County, 196 U.S. 276	3, 4, 13
Lewis v. United States, 348 U.S. 419	13
Lipke v. Lederer, 259 U.S. 557	10, 11
Mathews v. Rodgers, 284 U.S. 521	9
Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41	4, 7
Nathan H. Schur, Inc. v. City of Santa Monica, 47 Cal. 2d 11, 300 P.2d 431	5
People v. Skinner, 18 Cal. 2d 349, 115 P.2d 488	3
Phillips v. Commissioner, 283 U.S. 589	9
Prentis v. Atlantic Coast Line Co., 211 U.S. 210	4
Schur v. Johnson, 2 Cal. App. 2d 680, 38 P.2d 844	5
Spector Motors v. McLaughlin, 323 U.S. 101	8, 12
Speiser v. Randall, 357 U.S. 513	11, 12
Springer v. United States, 102 U.S. 586	3

Pages

Tank Truck Rental v. Commissioner, 356 U.S. 30 ..... 12, 15
Textile Mills Sec. Corp. v. Commissioner of Internal Revenue, 314 U.S. 326 ..... 12, 15

United States v. Kahriger, 345 U.S. 22 ..... 10, 14

Weyerhaueser v. Minnesota, 176 U.S. 550 3

CODES

California Revenue and Taxation Code:
Section 17297 ..... 2, 3, 4, 6
Section 19081 7

CONSTITUTION

California Constitution, Article XIII, Section 15 7

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 639

STUART ARONOFF; JASON and ILEYEN BERNIE; GLORIA BOYD; ALTHEA G. CASE; CLIFFORD R. GANS; NATHAN and IDA FRANKLIN; BUD CHARLES GORE and PHYLLIS GORE; MAX and TURA KLEIGER; SAMUEL ROBINSON and ANNA ROBINSON; HYMEN SMITH and SEVERT SMITH; MARTIN SIRODY and KATHRYN SIRODY; CLYDE E. and MARY JO SHIELDS; HARRY M. SUGARMAN and MARY SUGARMAN; MAX STEIN and FAY STEIN; ROY C. TROEGER and VIRGINIA RUFF TROEGER; RICHARD H. and PATRICIA TROEGER; HARLAND and IRENE WEIR;

Appellants,

vs.

FRANCHISE TAX BOARD of the State of California; STATE BOARD OF EQUALIZATION; JOHN W. LYNCH; GEORGE E. REILLY, PAUL R. LEAKE; RICHARD NEVINS and ALAN CRANSTON as members of the State Board of Equalization,

Appellees.

Appeal from the Supreme Court of the State of California

Motion to Dismiss or Affirm

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move the Court to dismiss this appeal or to affirm the judgment of the Supreme Court of the State of California, for the following reasons:

There is no substantial federal question presented as a basis of jurisdiction in this Court, inasmuch as the questions presented have been foreclosed by previous decisions of this Court.

STATEMENT OF THE CASE

The controversy arose in the following manner: In 1951 the California Legislature enacted a statutory provision relating to the California Personal Income Tax Act which has the effect of denying the deduction of expenses associated with the conduct of gambling activities (Rev. & Tax. Code sec. 17297). Pursuant to this statutory provision, the Franchise Tax Board disallowed deductions claimed by appellants with respect to gross income derived from their conduct of certain games played for prizes up to $25 in value. The Franchise Tax Board had notified appellants of its intention to disallow the deductions through notices of proposed tax assessments, all of the liability therein set forth being based on activities of appellants subsequent to the effective date of the statutory provision above mentioned. Initially, appellants requested and were granted a hearing with respect to the disallowance of deductions before the Franchise Tax Board. The appellants then exercised their statutory right to appeal the disallowance of these deductions to the California State Board of Equalization where they were afforded a formal hearing. The Board of Equalization rendered a written opinion upholding the proposed assessments, a copy of which is set forth in the

Appendix hereto. Thereafter, appellants filed a petition for a rehearing before the State Board of Equalization. Prior to the time the Board of Equalization acted on such petition for a rehearing, the appellants filed a petition in the California Supreme Court for an extraordinary writ to restrain the collection of the tax assessments. In accordance with California statutory and constitutional provisions expressly barring the issuance of such writ, the California Supreme Court declined to grant the relief requested by appellants. The California Supreme Court also pointed out that appellants had failed to exhaust administrative remedies prescribed by the California statutes prior to the commencement of a court action. The appellants, after payment of the tax, will be entitled to a trial *de novo* respecting the validity of the assessments in question.

The statement, at page 1 of Appellants' Jurisdictional Statement, that "the California court upheld alleged tax assessments under section 17297 of the Revenue and Taxation Code of the State of California" is incorrect. Since, as pointed out above, there was no occasion for the California Supreme Court to pass upon the validity of the assessments in question, the appellants are, in fact, seeking to have this Court review procedural and substantive issues prior to the time such issues have been considered by the California courts with respect to these appellants. The standards applied by the California Supreme Court and California appellate courts with respect to due process in tax proceedings are, however, the same as those applied by this Honorable Court. *People v. Skinner*, 18 Cal. 2d 349, 115 P.2d 488, citing *Den ex dem. Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272; *Springer v. United States*, 102 U.S. 586; *Bull v. United States*, 295 U.S. 247; *Wagerhaeuser v. Minnesota*, 176 U.S. 550; *Hodge v.*

Muscatine County, 196 U.S. 276; *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 109 P.2d 942, citing *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210; *Gorham Mfg. Co. v. State Tax Commission*, 266 U.S. 265, among others.

In summary, the procedure followed by the State has afforded appellants complete procedural due process and there are no substantive due process questions ripe for consideration by this Court. Appellants after payment of the tax will be afforded a trial *de novo* wherein they may raise the various constitutional objections which, in this proceeding, they seek to have this Court consider prematurely.

STATEMENT OF FACTS

Both prior and subsequent to the effective date of section 17297 of the California Revenue and Taxation Code, the appellants herein conducted games in which the players would purchase one or more "bingo" type cards with 75 numbers appearing thereon out of sequence. To win a merchandise prize of a value up to $25, it was necessary to get five numbers in a row either across, up or down, or diagonally. All of the numbers to be filled in on these cards were arrived at by throwing balls into receptacles.

The initial eight numbers selected were assigned to all players. Four of the five numbers in a winning combination could be based on these eight assigned numbers while at least one number of the winning combination was arrived at by a ball subsequently thrown by the individual player. Thus, by buying more cards a player could increase his chance of winning.

Prior to the time any of the tax liability here involved had accrued, it was held in a formal opinion of the California Attorney General that this type of operation consti-

tuted an illegal gambling activity (17 Ops. Cal. Atty. Gen. 64). The opinion involved the propriety of allowing the incorporation of such an operation by Nathan Franklin, one of the appellants herein.[1]

At the time the Franchise Tax Board began its investigation with respect to appellants in 1954, the business establishments of appellants held business licenses from the City of Santa Monica. The licenses expired June 30, but were subject to renewal. However, in 1954, the Chief of Police of Santa Monica refused to renew the licenses on the ground that the games were illegal because the winners were determined by chance.

A ruling of the Santa Monica City Council upholding the licensing of these games was challenged in a court proceeding. A decision of the trial court that these games were predominantly games of chance and therefore illegal was reversed by the California Supreme Court which did not pass on the legality of the games but based its reversal on procedural grounds. (*Nathan H. Schur, Inc. v. City of Santa Monica*, 47 Cal. 2d 11, 300 P.2d 431).[2]

The Franchise Tax Board issued its notices of additional tax proposed to be assessed on or about March 15, 1955, for the years 1951, 1952 and 1953. The proposed assessments as

---

1. It would have been possible to have challenged the action of the Corporation Commissioner in denying a permit to Nathan Franklin based on this Attorney General's opinion prior to Appellants incurring any tax liability, but this remedy was not pursued. There had also been prior holdings by the District Court of Appeal that similar games constituted gambling activities (*Schur v. Johnson*, 2 Cal. App. 2d 680, 38 P.2d 844; *Asher v. Johnson*, 26 Cal. App. 2d 403, 79 P.2d 457).

2. The trial court granted a trial *de novo* on the issue of legality which included watching the games being played. The California Supreme Court concluded that the trial court should confine itself to a review of the record before the City Council to ascertain if there was substantial evidence to sustain the latter's determination.

to 1951 were limited to the period subsequent to the effective date of section 17297 of the Revenue and Taxation Code. The Franchise Tax Board at a later time also issued other such notices as to 1954. Petitioners filed a protest with the Franchise Tax Board. Subsequent thereto, petitioners requested and were granted a hearing before the Franchise Tax Board in which petitioners were afforded an opportunity to express their views and present any evidence which would demonstrate that the proposed assessments were improper.[3] Petitioners, having failed to convince the Franchise Tax Board that the proposed assessments should be abated, appealed to the State Board of Equalization.

In an extensive hearing before the State Board of Equalization, the Franchise Tax Board offered documentary and testimonial evidence including eyewitness and expert testimony. Appellants cross-examined the Board's witnesses and offered expert testimony of their own. The hearing was conducted by Mr. John W. Lynch, the Chairman of the State Board of Equalization, as a hearing officer on behalf of that Board. A transcript of the hearing was prepared and written briefs were filed with the Board of Equalization by appellants and the Franchise Tax Board.

On September 20, 1962, the Board of Equalization rendered its opinion affirming the propriety of the assessments in question. Subsequent thereto, petitions for rehearing were filed by the appellants herein which have not yet been acted upon by the State Board of Equalization. In the petitions for rehearing, appellants did not challenge the correctness of the factual statements appearing in the opinion of the State Board of Equalization.

---

3. The transcript of the protest hearing consists of seventy-one pages. Only a one page excerpt thereof has been made part of the record herein.

After the decision of the Board of Equalization was rendered, appellants along with other taxpayers who have not joined in this appeal brought an original proceeding in the California Supreme Court seeking a writ of prohibition to restrain the collection of the tax. The California Supreme Court held the issuance of such a writ to restrain the collection of the tax was barred by article XIII, section 15 of the California Constitution and by section 19081 of the California Revenue and Taxation Code.[4] In addition, the Court held the appellants had failed to exhaust their administrative remedies as required by California law which follows decisions of this Court. See *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 109 P.2d 942, citing *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Gorham Mfg. Co. v. State Tax Commission*, 266 U.S. 265. The California Supreme Court found it unnecessary to reach the numerous constitutional arguments advanced by appellants which appellants are free to raise in a trial *de novo* in the superior court. A petition for rehearing was denied by the California Supreme Court.

THE QUESTION PRESENTED

The basic issue here presented is whether a substantial federal question is raised under the following circumstances: Under California law a taxpayer is entitled to an administrative hearing and review of tax assessments by an independent administrative agency of the State before any tax is paid; the taxpayer exercises his right to such a hearing; after an adverse decision by this independent ad-

4. Section 15 of article XIII of the California Constitution and section 19081 of the Revenue and Taxation Code expressly provide that "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State, or against any officer of this State to prevent or enjoin the assessment or collection of any tax. . . ."

MICRO CARD
TRADE MARK ®
22
PC 83
MATTHEW BENDER & COMPANY
MB
6-49
microcard

ministrative agency and while the taxpayer's petition for a rehearing therein is still pending, the State Supreme Court declines to issue an extraordinary writ to enjoin the collection of the tax and holds that under State law the taxpayer must exhaust his administrative remedies and pay the tax after which the taxpayer may seek a refund with interest in a trial *de novo* in the state courts, wherein he can raise all his constitutional objections to the validity of the tax assessment.

Since the California Supreme Court did not have to rule on the validity of the assessments or the validity of the statute here involved, or as to who had the burden of proof, or on the consequences which would follow in the event appellants failed to testify, appellants' statement as to the question presented bears virtually no relation to the true posture of this case. Appellants, in presenting to this Court questions relating to burden of proof, self-incrimination and the validity of the statute are asking this Court to consider matters not previously passed upon by the California courts, and are, in effect, asking this Court to guess how the California courts will construe the statute and rule on the other contentions of appellants in violation of the principles enunciated by this Court (*Spector Motors v. McLaughlin*, 323 U.S. 101, 105).

As previously pointed out, the appellants have enjoyed a full hearing before the Board of Equalization in which the representative of the Franchise Tax Board went forward with the evidence to establish that appellants were not entitled to the tax deduction which they seek and in which the appellants were afforded the opportunity to cross-examine the Franchise Tax Board's witnesses, to present evidence of their own, and to submit argument, both oral and written, and since appellants availed themselves of the opportunity so to do, appellants' references to *ex parte*

administrative proceedings and secret administrative notice are pure nonsense.

ARGUMENT

No substantial Federal Question Is Presented in This Case.

I. THERE HAS BEEN NO DENIAL TO APPELLANTS OF PROCEDURAL DUE PROCESS.

The California Supreme Court, in its opinion in this case, declined to relieve appellants of jurisdictional requirements under California law of exhausting their administrative remedies and of paying the tax assessments prior to bringing a suit in court, after appellants had enjoyed a full administrative hearing before the State Board of Equalization. It has been established by the decisions of this Court that procedural due process does not require that a hearing be granted before the tax is paid. *Bull v. United States*, 295 U.S. 247; *Den ex dem. Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272; see, also, *Phillips v. Commissioner*, 283 U.S. 589; *Mathews v. Rodgers*, 284 U.S. 521; *Enoch v. Williams Packing Co.*, 370 U.S. 1.

In the instant case, as mentioned above, appellants already have enjoyed an extensive hearing at the administrative level before the Board of Equalization which rendered a written opinion denying their right to the exemptions in question. In this administrative hearing, appellants were accorded all the procedural incidents of due process in a judicial trial including the right to be confronted by the witnesses for the state, the right to cross-examine such witnesses, the right to produce testimony, and the right to make both oral and written arguments. Appellants availed themselves of all these rights. In addition, after payment of the tax, appellants will be entitled to a trial *de novo* in the superior court, in which they may urge all their constitutional objections to the assessments here involved. In the

event the decision of the superior court is unfavorable to them, appellants may take an appeal to the California appellate courts.

Insofar as the requirement of the payment of the tax before trial in the California courts is concerned, appellants are being accorded the same procedural treatment that is accorded to any business man whose claim of a deduction of a business expense is challenged by the taxing agency.

Appellants' argument as to financial hardship is not well taken since, as observed in the opinion of the California Supreme Court, the appellants, had they chosen to do so, could have taken a test case in the California courts by paying a single assessment against one of the appellants, many of which were for less than $100.[5]

In the court proceeding, of course, appellants may raise questions as to who has the burden of proving the propriety of the claimed deduction. It is readily apparent that many assessments of state taxes are challenged on constitutional grounds, but that such challenge does not avoid the necessity of exhausting administrative remedies or following the other procedures prescribed by State law.

Appellants place great reliance on *Lipke v. Lederer*, 259 U.S. 557, which was decided in 1922. To the extent that *Lipke* and the other early federal cases cited by petitioners would classify as a criminal penalty special tax treatment for certain activities which are inimical to the public interest, it is inconsistent with more recent decisions of this Court which are enumerated in *United States v. Kahriger*, 345 U.S. 22, at page 27.

A further distinction of *Lipke v. Lederer*, 259 U.S. 557, is that that case involved the summary seizure and sale of

---

5. It is to be observed in passing that under the federal tax laws financial hardship is no longer a basis for enjoining the collection of a tax. *Enoch v. Williams*, 370 U.S. 1.

property without affording the affected party a hearing of any kind. In the instant case, on the other hand, the initial assessments in question were made over eight years ago. In the interim appellants have been afforded opportunities to present evidence to the Franchise Tax Board to sustain their claim of deductions. They have been accorded a full hearing before the State Board of Equalization in which the Franchise Tax Board went forward with the evidence and appellants were afforded an opportunity to present evidence of their own to cross-examine witnesses and to make arguments, both oral and written. In the event the appellants choose to challenge the validity of the tax assessment in the state court after payment of the tax, they will be able to recover with interest any overpayment which is judicially determined to have been made. Thus, the procedures followed in this case do not in any wise parallel those involved in *Lipke v. Lederer*.

Appellants, in an effort to find support for their contentions, also refer to the decision of this Court in *Speiser v. Randall*, 357 U.S. 513.[6] The *Speiser* case is not here relevant. The problem there involved was a California statutory provision requiring a taxpayer claiming a tax exemption to execute a non-communist affidavit. If the assessor denied the exemption, the taxpayer could bring an action in the courts to challenge the assessor's determination. This Court held the statutory provision invalid as being violative of the provisions of the First Amendment of the United States Constitution respecting free speech which are incorporated into the Fourteenth Amendment. It is readily apparent that the availability of the exemption was conditioned on a matter extraneous to the computation of the tax.

---

6. Contrary to the statement at page 9 of Appellants' Jurisdictional Statement, the Franchise Tax Board was not a party in the *Speiser* case.

i.e., it was conditioned on the beliefs of the individual unrelated to the incidence, measure or rate of the property tax involved. In the instant case, on the other hand, there is a denial of a deduction in the computation of taxable income. The denial arises from the nature of the deduction claimed. It is no different than denial of a deduction for rent paid by a private person or the denial of a deduction on the ground that a claimed expense was not a reasonable and necessary business expense. A taxpayer can only deduct expenses in the manner and to the extent prescribed by statute. Certainly, there is here no greater constitutional problem than if there was a denial of a deduction for the expenses incurred in lobbying. The denial of a deduction for lobbying expense was expressly upheld in *Textile Mills Sec. Corp. v. Commissioner of Internal Revenue*, 314 U.S. 326, which was cited with approval in *Tank Truck Rental v. Commissioner*, 356 U.S. 30.

Moreover, in contrast to *Speiser v. Randall*, 357 U.S. 513, where all the facts were agreed upon and the California Supreme Court had rendered a written opinion on the various constitutional issues raised, in the instant case the only action taken by the state court was a refusal by the California Supreme Court to restrain the collection as to the tax assessments in question. The California Supreme Court quite properly found it unnecessary to express any views on the various contentions of appellants herein as to burden of proof, self-incrimination, etc. The decision of the California courts on these issues will await the commencement of a refund action by appellants after they have exhausted their administrative remedies and paid the tax. In short, the constitutional contentions raised by appellants are not ripe for consideration by this Court. *Spector Motors v. McLaughlin*, 323 U.S. 101, 105.

For the same reason, the other authorities relied on by appellants which are directed to issues not yet passed upon by the California courts are not in point, e.g. *Boyd v. United States*, 116 U.S. 616, dealing with the constitutional provision relating to self-incrimination.

II. THERE HAS BEEN NO DENIAL OF SUBSTANTIVE DUE PROCESS.

Much of appellants' argument hinges on their contention that the disallowance of deductions for expenses incurred in the conduct of illegal activities constitutes a criminal penalty. While, as will be shown herein, similar contentions have been rejected in many decisions of this Court, it is to be observed initially that the California courts have not yet passed on this contention of appellants and it may be raised by appellants in a trial *de novo* in the superior court.

That the disallowance of deductions herein does not constitute a criminal penalty is clear from *Lewis v. United States*, 348 U.S. 419, wherein arguments similar to those of appellants herein were considered and rejected by this Court. Thus, this Court held that a tax on gambling activities did not constitute a criminal penalty despite the fact that the gambling activity was being conducted in Washington, D.C. in violation of federal statutes, the Court pointing out that the federal government could tax what it also forbids. In addition, in the *Lewis* case this Court rejected a number of arguments as to self-incrimination which parallel those made by appellants in the instant case.

Moreover, it has been held by the California courts that section 17297 does not constitute a criminal penalty (*Hetzel v. Franchise Tax Board*, 161 Cal.App.2d 224, 326 P.2d 11, hearing denied by California Supreme Court). This Court will generally accept the determination of the State court on this issue unless it is clearly wrong. *Hodge v. Muscatine County*, 196 U.S. 276, 279.

This Court has recognized the propriety of special tax treatment in various situations in which the effect of the exaction is to discourage the particular activity in question. Thus, in *United States v. Kahriger*, 345 U.S. 22, this Court was concerned with the propriety of a tax on persons engaging in the business of accepting wagers which required such persons to register with the Collector of Internal Revenue. The constitutional validity of the act was challenged on the ground that Congress under the pretense of exercising its power to tax was attempting to penalize illegal intrastate gambling through the regulatory features of the act and that the registration provisions of the tax violated the privilege against self-incrimination and that such provisions were arbitrary, vague and contrary to the guarantees of the Fifth Amendment. In upholding the validity of the tax, the Court discussed the employment of the taxing power in situations which resulted in discouraging the activity in question. At page 27, this Court said:

> "Appellee would have us say that, because there is legislative history indicating a congressional motive to suppress wagering, this tax is not a proper exercise of such taxing power. In the *License Tax Cases, supra*, it was admitted that the federal license 'discouraged' the activities. The intent to curtail and hinder, as well as tax, was also manifest in the following cases, and in each of them the tax was upheld: *Veazie Bank v. Fenno*, 8 Wall. 533 (tax on paper money issued by state banks); *McCray v. United States*, 195 U.S. 27, 59 (tax on colored oleomargarine); *United States v. Doremus*, 249 U.S. 86, and *Nigro v. United States*, 276 U.S. 332 (tax on narcotics); *Sonzinsky v. United States*, 300 U.S. 506 (tax on firearms); *United States v. Sanchez*, 340 U.S. 42 (tax on marihuana).
>
> "It is conceded that a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed. Nor is the tax invalid be-

cause the revenue obtained is negligible. Appellee, however, argues that the sole purpose of the statute is to penalize only illegal gambling in the states through the guise of a tax measure. As with the above excise taxes which we have held to be valid, the instant tax has a regulatory effect. But regardless of its regulatory effect, the wagering tax produces revenue. As such it surpasses both the narcotics and firearms taxes which we have found valid.

"It is axiomatic that the power of Congress to tax is extensive and sometimes falls with crushing effect on businesses deemed unessential or inimical to the public welfare, or where, as in dealings with narcotics, the collection of the tax also is difficult. . . ."

Moreover, it has been recognized by this Court that tax deductions are a matter of legislative grace. *Commissioner v. Sullivan*, 356 U.S. 27, 28. This Court has on a number of occasions expressly sanctioned the denial of deductions of expenses incurred in activities that contravene federal or state policy; *Textile Mills Sec. Corp. v. C.I.R.*, 314 U.S. 336 (deduction for lobbying expenses denied); *Tank Truck Rentals v. Commissioner*, 356 U.S. 30 (denial of deductions for overload penalty fees imposed under State law).

The foregoing authorities also refute appellants' contention that the disallowance of tax deductions constitutes the tax a bill of attainder. Equally untenable is appellants' contention that this is a gross receipts tax, a proposition rejected in the construction of the statute by the California Courts (*Hetzel v. Franchise Tax Board*, 161 Cal. App. 2d 224, 326 P.2d 11). Moreover, appellants may, if they choose, raise such contentions in their trial *de novo* in the superior court.

It is also to be observed that the statute of limitations has long since run on any criminal prosecution with respect to the games here involved, so that appellants' contentions

as to possible self-incrimination have no factual basis and are utterly devoid of substance.

Contrary to appellants' contention at page 12 of their jurisdictional statement, as demonstrated by the discussion set forth above, there is nothing novel about denying tax deductions as to expenses which were incurred in activities violative of public policy. The difficulty of appellants' position is demonstrated by the fact they find it necessary at page 14 of their jurisdictional statement to assume and discuss fictitious statutory provisions, the enactment of which has never even been considered. It is axiomatic that this Court will not render advisory opinions as to hypothetical facts or statutory provisions.

CONCLUSION

For the reasons set forth above, the denial by the California Supreme Court of an extraordinary writ to stay the collection of the tax assessed against appellants after the hearing before the State Board of Equalization does not present any substantial federal questions. Accordingly, it is respectfully submitted that this appeal should be dismissed or in the alternative the decision of the California Supreme Court should be affirmed.

STANLEY MOSK
Attorney General of the
State of California

DAN KAUFMANN
Assistant Attorney General

ERNEST P. GOODMAN
Deputy Attorney General
600 State Building
San Francisco 2, California

Counsel for Appellees.

(Appendix Follows)

Appendix

Opinion of the State Board of Equalization
Of the State of California

In the Matter of the Appeals of
STUART ARONOFF, et al.

Appearances:

For Appellants: Thomas W. LeSage, William B. Beirne and Louis C. Hoyt, Attorneys at Law

For Respondent: Wilbur F. Lavelle, Associate Tax Counsel, and Israel Rogers, Assistant Counsel

OPINION

These appeals are made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on protests of a number of individuals named in the order attached hereto, against proposed assessments of additional personal income tax for the years 1951, 1952, 1953 and 1954.

Collectively, the Appellants herein operated six business establishments in the city of Santa Monica from May 23, 1951 to October 5, 1954. These business establishments were called "Blackout," "Vogue," "Jade," "Cameo," "Shamrock," and "Nate Franklin's." Each of the Appellants herein was the owner of or a partner in one or more of these businesses. In each of the business establishments a certain game was played, which will be described hereafter.

Partnership and individual tax returns were filed for the period in question. Respondent disallowed all expenses attributable to these businesses pursuant to section 17359 (now 17297) of the Revenue and Taxation Code which read:

> In computing net income, no deductions shall be allowed to any taxpayer on any of his gross income derived from illegal activities as defined in Chapters 9, 10 or 10.5 of Title 9 of Part 1 of the Penal Code of California; nor shall any deductions be allowed to any taxpayer on any of his gross income derived from any other activities which tend to promote or to further, or are connected or associated with, such illegal activities.

It is Respondent's contention that the operation of the game in question was a lottery as defined in section 319 of the Penal Code. Section 319 is in Chapter 9 of Title 9 of Part 1 of the Penal Code.

The Supreme Court has declared that there are three elements of a lottery: (1) a prize, (2) distributed by chance, and (3) consideration. (*California Gasoline Retailers v. Regal Petroleum Corp.*, 50 Cal. 2d 844.) In the case of the games in question the players paid a consideration to play and prizes were awarded to winners.

Before reaching the question of whether the winners of the games were determined by chance, we must consider several contentions of Appellants as to the scope of our examination.

The six businesses each received a business license from the city of Santa Monica. The licenses expired each June 30 but were renewed. In 1954, however, the chief of police refused to renew the licenses on the ground that the games were illegal because the winners were determined by chance.

Appellants appealed to the city council and a public hearing was held on August 17, 1954. At the beginning of the hearing the city attorney stated that the issue before the council was the factual one of whether, on the basis of the evidence, it appeared that the winners of the games were determined predominantly by chance or predominantly by skill. The evidence before the city council consisted of a statement of how the games were played, this statement having formed part of the application for a license; a compilation of the actual results of a number of games; testimony of Appellant Roy C. Troeger concerning the operation of the games and offering the observation that "the experienced player will accomplish a greater number of wins than the inexperienced player"; and testimony of a physicist that the games were predominantly games of skill because the statistics compiled from the actual results of a number of games showed a grouping which could not occur as a result of chance alone. The city council's decision was that the games were predominantly games of skill.

A taxpayer of Santa Monica then brought a proceeding against the city of Santa Monica in the superior court to prohibit the city from issuing the licenses on the ground that the games were illegal lotteries. The trial judge took evidence and concluded that the games were predominantly games of chance and therefore illegal. He orally announced his decision on October 5, 1954, and the operators of the games immediately closed down.

This judgment was appealed and on August 17, 1956 the California Supreme Court reversed. (*Nathan H. Schur, Inc., v. City of Santa Monica*, 47 Cal. 2d 11.) The Supreme Court held that the only issue before the superior court was the validity of the city license, that the city council exercised a quasi-judicial function in the licensing procedure and

therefore the superior court could not receive evidence on the issue of chance but must confine itself to a review of the record before the city council to determine whether there was substantial evidence to sustain the city council's determination. In the course of its opinion the court also stated, "It should also be observed that whether licenses are or are not issued the criminal law is still open to Schur."

The parties to the proceeding never brought the matter to a retrial in the superior court because in the meantime the Santa Monica City Council had passed an ordinance prohibiting the conduct of games of the type in question.

Appellants contend that the Santa Monica City Council had jurisdiction to consider the legality of the games, that it exercised a quasi-judicial function, that it held a hearing and received evidence, that it made its decision and that the decision is now final and determinative of the issue before us.

Appellants' contentions are refuted by the above-quoted portion of the opinion in the *Schur* case to the effect that the criminal law is still open. As we read the *Schur* opinion, the reasoning is that the city council had jurisdiction to determine whether a city license should issue and its decision was final in the absence of an error of law. The city council, however, had no criminal jurisdiction and therefore its determination would have no effect on a criminal proceeding even though an identical issue might have to be decided in both the licensing and the criminal proceedings. To the same effect is *People v. Settles*, 29 Cal. App. 2d Supp. 781, which held that the possession of a city license to conduct a game of skill did not constitute a binding determination that the game was in fact a game of skill so as to be a defense in a criminal prosecution for operating an illegal lottery.

Similarly, the determination of the amount of taxes owed is independent of the city licensing procedure. The fact that there might be a common issue in both types of proceedings as applied to specific individuals is merely a coincidence and does not alter our duty to decide these appeals on the record before us.

The game in each business establishment was played by a maximum of 50 players, each of whom paid a fee to play. A merchandise prize was awarded to the winner. A seat at a counter was provided for each player. In front of each player was a receptacle divided into 75 compartments each 1⅞" square and numbered from 1 to 75. In the center of the receptacle there was an unnumbered hole 3½" square painted red. Each player was provided with rubber balls 1½" in diameter.

Each player was also provided with a card containing 75 numbers arranged in 5 columns of 15 numbers each. The first column contained the numbers 1 to 15 but arranged out of numerical sequence, the second column contained the numbers 16 to 30, similarly arranged, and so on as to the remaining columns. A player could play more than one card but paid an extra fee for additional cards. Out of all the cards used in the game no two cards had the numbers arranged in the same order.

The play began by the operator designating eight of the players to throw one ball in his receptacle in turn. Thereby eight numbers were selected and all persons playing covered the corresponding numbers on their cards with white markers. The receptacles of the eight players throwing the "set up" balls were cleared and thereupon all players began to throw "skill" balls into their respective receptacles and covered the corresponding numbers on their cards with black markers.

The winner was the player having five markers in a row horizontally, vertically or diagonally on his card with the lowest number of black markers. Speed was not a factor in winning. It was possible for two or more players to tie and ties regularly occurred.

Of the five markers in the winning combination, at least one was required to be a black marker. That is, if the numbers covered as a result of the eight "set up" balls gave a particular player five in a row he would not be declared the winner until he had thrown at least one "skill" ball in a receptacle with one of these numbers thereby replacing his white marker with a black marker.

There were introduced in evidence reports of the winning results in some 7,000 games played at one of the locations. These reports were compiled by recording as to the winner of each game the number of black markers in his winning combination and the number of black markers on his card. These reports showed a pattern of very few of the winners having less than 5 black markers on the card, a few of the winners having 10 or more black markers on the card (ranging up to 15) and the great bulk of the winners having from 5 to 9 black markers on the card. More than 30 percent of the winners had 5 black markers on the card.

As stated above, of the three elements of a lottery, consideration, prize and chance, the first two are clearly present in this case and it is only the chance element which is in issue. The test to be applied is stated in *People v. Settles*, supra, as follows:

> A game is not to be regarded as one of skill merely because that element enters into the result in some degree, or as one of chance solely because chance is a factor in producing the result. The test of the character of a game or scheme as one of chance or skill is, which of these factors is dominant in determining the result?

Respondent presented an engineer as an expert witness. He stated that in his opinion both chance and skill were present but that chance predominated over skill in determining the winners of the games. He never observed the playing of the games but based his opinion on a description of the games furnished to him and on the reports of the winning results of some 7,000 games described above.

His reasoning proceeded along several alternative lines. The relative position of a player as a result of the eight "set up" balls was determined by chance. The reports of the winning results indicated that the winner averaged 7.12 black markers on his card and 2.98 black markers in his winning combination. From this he reasoned that chance predominated over skill because the winner was unable to get a ball in a particular hole as often as half the time. He also suggested an economic analysis to the effect that if it were possible to develop some substantial skill, some players would have done so and they would win most of the time and thereby discourage the ordinary player from playing.

Appellants presented a mathematician as an expert witness. He never observed the playing of the game and based his analysis on the same data as Respondent's expert, namely, a description of the game and the reports of the winning results of over 7,000 games.

The mathematician's method was to assume that the winner was determined solely by chance and to construct a mathematical model of this hypothesis. From the model he derived certain conclusions and tested them against the results of actual games. When the actual results were substantially different from the results to be expected if the winner was determined solely by chance, he concluded that the probability was 1 in 100,000,000 that the actual results had occurred solely by chance.

Appellants' expert stated his opinion that the game was not one in which the winner was determined solely by chance. Based on his opinion that the chance probability was extremely small, he concluded that the game was predominantly one of skill. He defined "skill" as any factor which enables a player to improve the performance over chance performance.

There are two California cases (*Einzig v. Board of Police Commissioners*, 138 Cal. App. 664; and *People v. Babdaty*, 139 Cal. Supp. 791) which hold tango games to be games of chance. The tango games were almost identical to the "set up" ball phase of Appellants' games except that they did not stop at eight "set up" balls but continued until there was a winner.

In *Brown v. Board of Police Commissioners*, 58 Cal. App. 2d 473, the trial court ordered a city permit to be issued for the conduct of a game virtually identical to Appellants' games except that it had no "set up" ball feature. The balls used were "of such density that when tossed into a hole they will remain and not bounce out." The trial court had found the game to be one predominantly of skill. The trial court had watched a demonstration of the game. On appeal it was held that there was substantial evidence to sustain the finding that skill predominated.

On February 19, 1951, the Attorney General issued an opinion that a game virtually identical to Appellants' games was a game in which chance predominated. (17 Ops. Cal. Atty. Gen. 63.) The Attorney General stressed the chance basis for the selection of the first eight numbers and also said,

> Considering the factors that undoubtedly would be present, such as variance in the weight and size of the rubber ball, slight differences in the size of the slots, etc., it would appear that direct hits in selected

slots would be predominantly the result of chance and not skill.

We have found two cases from New Jersey, involving games similar to the one in question, except that they did not entail the use of "set up" balls. In *O'Brien v. Scott*, 89 A.2d 280 (N. J. Sup'r Ct.), the court concluded that skill was the dominant factor. On the other hand, it was held in *Ruben v. Keuper*, 127 A.2d 906 (N. J. Sup'r Ct.), that the game was one of chance.

We were particularly impressed by the opinion in *Ruben v. Keuper*, where the court received the testimony of a statistician as to the results of a series of games in which two experts played against two novices and the experts won about 70 percent of the games. The court said (127 A.2d 906, at 909):

> There is no denial of the factual premise that a player can develop an expertness in either of the games presently under examination sufficient to enable him to compete successfully in a contest with a novice. But plaintiffs' operations do not consist of the conduct of contests of that kind. Plaintiffs' case must be judged by what they actually do, not by a theoretical analysis of an experiment that does not characterize what occurs in their establishments. The average game they run is one in which a score or more of casual boardwalk passersby of various degress of inexpertness try their hand in competition with others of the same ilk, and against the house. These are games in which comparative novices can win an occasional prize and thus titillate themselves and others into continued participation. To them the lure is chance and not an opportunity to match skills. Whatever one may say as to the expert, there can be no question but that the average or novice player is risking his dime against the lucky contingency that his balls will fall into a winning combination sooner than those of any other contestant; . . .

In the games with which we are concerned it is clear that from the point of view of any given player the eight numbers selected as a result of the "set up" balls were selected wholly at random. The only exception was where the player had thrown one of the "set up" balls, in which case, as to that player, the other seven numbers selected as a result of the "set up" balls were selected wholly at random.

The reports of the results of actual games showed that, on the average, of the winner's winning combination of five numbers two were the result of "set up" balls. Thus, about 40 percent of the winning result was wholly by chance on this ground alone.

As to the portion of the play following the throwing of the "set up" balls, it is inevitable that in almost all instances the rubber ball bounced around considerably before it settled in one of the compartments. It would indeed be an amazing feat of skill to be able to control the direction of rebound of the ball after it struck one of the partitions in the receptacle.

We find therefore as to the games conducted by Appellants that the winners were determined predominantly by chance and that the games were illegal lotteries.

We think this conclusion is not inconsistent with the opinion expressed by Appellants' expert witness. The reason for the difference between our conclusion and his conclusion lies in his definition of chance and skill. We believe that primarily what he has measured and labelled as "skill" was merely ordinary manual dexterity by which a player was usually able to keep the ball within a particular area of the box, thus increasing his probability of having the ball land in a given hole. For example, his probability for a given hole might have been 1 in 20 instead of the blindfolded or pure chance probability of 1 in 75.

While a person who, for one reason or another, lacked ordinary manual dexterity or was blind, would no doubt have been under a handicap in competing with the other players, possession of such ordinary manual dexterity together with the ability to see for at least a short distance was not skill. This merely qualified the player for the competition and among the qualifying players the result was determined primarily by chance.

ORDER

Pursuant to the views expressed in the Opinion of the Board on file in this proceeding and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests of the following Appellants to proposed assessments of additional personal income tax for the years and in the amounts indicated be sustained:

Appellant	Year	Amount
Stuart B. Arnoff	1951	$ 34.19
	1952	2,177.66
	1953	6,143.31
	1954	4,269.78
Jason H. and Heyne Bernie	1951	33.76
	1952	941.76
	1953	2,396.98
	1954	2,264.55
Gloria Boyd	1951	12.96
	1952	930.94
	1953	2,739.85
	1954	2,489.45
Leon Brown	1951	13.05
Irma Brown	1951	19.58
Leon and Irma Brown	1952	1,252.75
	1953	3,935.14
	1954	3,086.06

Appellant	Year	Amount
Richard Brown	1951	$ 4.83
Richard L. and Sandra Brown	1952	187.46
	1953	610.37
	1954	500.88
Althea G. Case	1951	17.76
	1952	214.88
	1953	891.89
	1954	590.90
Ralph Davis	1951	93.97
Ray Davis	1951	62.65
Ralph and Ray Davis	1952	5,249.08
	1953	10,871.27
	1954	9,586.48
Ralph Davis, Jr.	1951	17.59
Marjorie Davis	1951	6.52
Ralph, Jr., and Marjorie Ann Davis	1952	1,080.05
	1953	3,604.61
	1954	3,045.91
Allen S. and Barbara B. Feder	1951	5.21
	1952	171.34
	1953	599.13
	1954	512.47
Nathan and Ida Franklin	1951	12,839.70
	1952	23,409.14
	1953	23,406.16
	1954	54,099.66
Clifford R. Gans	1951	6,039.25
	1952	18,536.18
	1953	28,795.96
	1954	6,139.43
Bud Charles and Phyliis Gore	1951	11.67
	1952	477.63
	1953	1,910.05
	1954	2,319.26
Max and Tura Kleiger	1951	5,986.25
	1952	18,395.84
	1953	28,724.78
	1954	17,588.60
Samual and Anna Robinson	1952	8,273.24
	1953	13,502.32
	1954	3,732.17
Martin and Kathryn Strody	1952	5,008.78
	1953	10,070.03
	1954	5,230.25

Appellant	Year	Amount
Hymen and Severt Smith	1951	$ 1,602.11
	1952	28,762.48
	1953	35,148.16
	1954	19,213.06
Max and Fay Stein	1953	327.04
	1954	1,166.60
Harry M. and Mary Sugarman	1951	17.79
	1952	992.60
	1953	2,552.13
	1954	3,024.77
Roy C. Troeger	1951	71.14
Virginia Ruff Troeger	1951	20.11
Roy C. and Virginia Ruff Troeger	1952	3,957.19
Roy C. Troeger	1953	6,658.20
Virginia Ruff Troeger	1953	2,588.31
Roy C. and Virginia Ruff Troeger	1954	8,317.39
Mary Joe Troeger	1951	6.99
	1952	613.15
	1953	2,045.43
Clyde E. and Mary Joe Shields	1954	1,296.65
Richard H. Troeger	1951	3.97
Richard H. and Patricia Troeger	1952	277.26
	1953	1,043.78
	1954	1,010.33
Harland and Irene Weir	1951	3.56
	1952	129.57
	1953	425.82
	1954	365.70

Done at Sacramento, California, this 20th day of September 1962, by the State Board of Equalization.

Geo. R. Reilly, Chairman
John W. Lynch, Member
Richard Nevins, Member
Paul R. Leake, Member
....., Member

Attest:
Dixwell L. Pierce, Secretary

SUBJECT INDEX

		Page
1.	The scope of Section 17297	4
2.	The California refund action	5
3.	Federal jurisdiction and the procedural aspects of the California decision	7
	(a) The withdrawal of all judicial remedies by injunction, writ of mandate or other legal or equitable process	7
	(b) The California administrative proceedings	9
4.	The enormous penalties imposed in this case	11
5.	Reply to other contentions in the brief	14
Conclusion		17
Appendix A—Excerpt from 3 Witkin, California Procedure, p. 2567		App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Bantam Books v. Sullivan, 9 L. Ed. 2d 584	2, 4, 5, 9
Burnet v. Logan, 283 U. S. 404	13
Cotting v. Kansas City Stock Yards Company, 183 U. S. 79	4
Doyle v. Mitchell, 247 U. S. 1479	13
Fiske v. Kansas, 274 U. S. 380	2
General Oil Co. v. Crain, 209 U. S. 211	2
Helvering v. Mitchell, 303 U. S. 391	15
Hetzel v. Franchise Tax Board, 161 Cal. App. 2d 224, 326 P. 2d 611	14, 17
Iowa-Des Moines Bank v. Bennett, 284 U. S. 239	2
Kahriger Case, 345 U. S. 22	16
Kennedy v. Mendoza-Martinez, 9 L. Ed. 2d 644	9
Lewis v. United States, 348 U. S. 419	16
Lipke v. Lederer, 259 U. S. 557	9, 14
Marcus v. Property Search Warrant, 367 U. S. 717	2, 4, 9
Missouri R.R. & Co. v. Tucker, 230 U. S. 340	2
Norris v. Alabama, 294 U. S. 587	3
Poindexter v. Greenhow, 114 U. S. 729	2, 3, 7, 9
Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69	4
Schur Case, 47 Cal. 2d 11	17

Page

Speiser v. Randall, 357 U. S. 513 .....7, 10

Stewart Dry Goods Co. v. Lewis, 294 U. S. 550 13

Tank Truck Rentals, Inc. v. Commissioner, 356 U. S. 30 14

Thompson v. Louisville, 362 U. S. 199 11

United States v. Constantine, 296 U. S. 287 16

United States v. Sanchez, 340 U. S. 42 15

Ward v. Lane County, 253 U. S. 17 2

Wolfe v. North Carolina, 364 U. S. 177 .....8, 9

Young, Ex parte, 209 U. S. 123 .....2, 4

Young v. Ragen, 337 U. S. 235 .....2, 3

Statutes

California Penal Code, Sec. 335 5

California Penal Code, Sec. 336 5

California Penal Code, Sec. 337d 5

California Penal Code, Sec. 337f 5

Califorinia Penal Code, Sec. 337.5 5

California Revenue & Taxation Code, Sec. 17297 .....4, 6, 11, 14, 15

California Revenue & Taxation Code, Sec. 18641, et seq. 13

California Revenue & Taxation Code, Sec. 18861, et seq. 13

California Revenue & Taxation Code, Sec. 18881, et seq. 13

Page

California Revenue & Taxation Code, Sec. 18906.... 13
California Revenue & Taxation Code, Sec. 18907.... 13
United States Code, Title 26, Sec. 3290 16
United States Constitution, Fifth Amendment 10
United States Constitution, Fourteenth Amendment 18

Textbooks

17 Opinions California Attorney General, p. 64 16
2 Stanford Law Review, p. 285 8
3 Witkin, California Procedure, p. 2567 8

IN THE

Supreme Court of the United States

October Term, 1963
No. 639

STUART ARONOFF; JASON and ILEYEN BERNIE; GLORIA BOYD; ALTHEA G. CASE; CLIFFORD R. GANS; NATHAN and IDA FRANKLIN; BUD CHARLES GORE and PHYLLIS GORE; MAX and TURA KLEIGER; SAMUEL ROBINSON and ANNA ROBINSON; HYMEN SMITH and SEVERT SMITH; MARTIN SIRODY and KATHRYN SIRODY; CLYDE E. and MARY JO. SHIELDS; HARRY M. SUGARMAN and MARY SUGARMAN; MAX STEIN and FAY STEIN; ROY C. TROEGER and VIRGINIA RUFF TROEGER; RICHARD H. and PATRICIA TROEGER; HARLAND and IRENE WEIR,

Appellants,

vs.

FRANCHISE TAX BOARD of the State of California; STATE BOARD OF EQUALIZATION; JOHN W. LYNCH; GEORGE E. REILLY; PAUL R. LEAKE; RICHARD NEVINS and ALAN CRANSTON as members of the State Board of Equalization,

Appellees.

Appeal From the Supreme Court of the State of California.

REPLY TO MOTION TO DISMISS OR AFFIRM.

Appellants respectfully reply to the Brief of the Attorney General of California filed in support of its Motion to Dismiss or Affirm.

California's plea makes necessary citation of the following additional authorities in support of the jurisdiction of this Court.

Poindexter v. Greenhow, 114 U. S. 729;
Ex parte Young, 209 U. S. 123;
Young v. Ragen, 337 U. S. 235;
General Oil Co. v. Crain, 209 U. S. 211;
Marcus v. Property Search Warrant, 367 U. S. 717;
Bantam Books v. Sullivan, 9 L. Ed. 2d 584;
Ward v. Lane County, 253 U. S. 17;
Iowa-Des Moines Bank v. Bennett, 284 U. S. 239;
Fiske v. Kansas, 274 U. S. 380;
Missouri R.R. & Co. v. Tucker, 230 U. S. 340.

The withdrawal of effective State remedies for protection of a Federal right is a denial of due process of law; and a decision which denies such protection gives effect to the law and the decision is reviewable on appeal. (*General Oil Co. v. Crain*, 209 U. S. 211, 228; *Poindexter v. Greenhow*, 114 U. S. 270.)

"To take away all remedy" this Court ruled in *Poindexter v. Greenhow*, 114 U. S. 230, 303, "for the enforcement of a right [under the U. S. Constitution] is to take away the right itself. *But this is not within the power of the State.*"

A refund action will not remedy or ratify a prior encroachment of a Federal right. (*Poindexter v. Greenhow*, 114 U. S. 270.)[1]

---

[1]In *Poindexter*, this Court rejected a contention similar to that now made by California. The rejected contention of Virginia was stated as follows:

"It is urged upon us, however, that in a revenue system, a provision of law which gives to a party complaining of

In *Poindexter*, Virginia's taxing statute, as California's here, provided "no writ for the prevention of any revenue claim, or to hinder or delay the collection of the same, shall in any wise issue, either *injunction, supersedeas, mandamus, prohibition or any other writ or process whatsoever;* but in all cases, if, for any reason, any person shall claim that the revenue so collected of him was wrongfully or illegally collected, the remedy for such person shall be as above provided."—*i.e.* by refund.

This Court held in *Poindexter* that, in the context of that case, a refund action was "no remedy whatsoever," and that "this wrong [deprivation of constitutional right] is without remedy by any law of Virginia" and reversed on *appeal*, the final decision of a Virginia Court upholding the Virginia tax refund statute as an exclusive remedy.

State procedural niceties may not close the door to effective consideration of Federal rights. (*Young v. Ragen*, 337 U. S. 235.)

This Court, of course, will always inquire not only whether the Federal right was denied in express terms, but also whether it was denied in substance and effect. (*Norris v. Alabama*, 294 U. S. 587.)

---

an illegal exaction of taxes the right to recover back the amount in dispute only after previous payment under protest, as the sole remedy against either the officer of the government, is a just and reasonable rule, sufficiently securing private rights, and convenient, if not necessary, to the interests of the public. We are referred to the revenue laws of the United States for illustration and example, and the question is put, why a similar provision, as it is assumed to be, should not be considered adequate as a remedy for the holders of coupons in Virginia, who have been denied the right to use them in payment of taxes." (P. 300.)

Whether a "tax" deprives the taxpayer of a Federal right is not dependent upon the State characterization, but upon the operation and effect of the "tax." (*Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69.)

The enormous penalty provisions are violative of the Fourteenth Amendment. (*Cotting v. Kansas City Stock Yards Company*, 183 U. S. 79; *Ex parte Young*, 209 U. S. 123.)

A law which directly or indirectly imposes conditions upon the right to judicial relief so burdensome or arbitrary as to prevent judicial inquiry, or to coerce its abandonment or to restrain reasonable and free access to the courts, is unconstitutional. (*Ex parte Young*, *supra*.)

State regulations superimposed upon the criminal law but eliminating the safeguards of the criminal process do not satisfy due process. (*Bantam Books v. Sullivan*, 9 L. Ed. 2d 584.)

Procedures which impose criminal sanctions or punishment, procedures which authorize *ex parte* impairment of constitutional rights, are not validated by after the fact administrative or judicial remedies. (*Marcus v. Property Search Warrant*, 367 U. S. 717.)

1. The Scope of Section 17297.

The Attorney General's Brief, referring to Section 17297 declares the section has "the effect" of denying deductions "associated with the conduct of gambling activities" (p. 2).

Again we respectfully note that Section 17297 includes within the expression "illegal activities" and activities which "tend" to "promote" or "to further" or are "con-

nected" or are "associated" with illegal activities such disparate felonies and misdemeanors as:

(a) Felony of bribing an umpire of a ball game or other sporting event (Penal Code 337d);

(b) Misdemeanor of refusing to leave a race track when ordered (Penal Code 337.5);

(c) Misdemeanor of permitting minors to play games of chance where liquor is sold (Penal Code 336);

(d) Misdemeanor on part of District Attorney, etc. who fails to "inform" and "diligently" prosecute offenders under Chapter 10 (Penal Code 335);

(e) Felony of doping race horses, etc. (Penal Code 337f).

The California Legislature has evidentally accepted the novel theory that the sovereign power if given the legislative designation of "tax" or "deduction" extends to the enforcement of all penal offenses premised on administrative verdict of criminal guilt.

However, this Court has held that criminal sanction may be applied "only after" a determination of criminal guilt has been made in a criminal trial "hedged about with the procedural safeguards of the criminal process." (*Bantam Books v. Sullivan*, 9 L. Ed. 2d 584, 593.)

2. The California Refund Action.

California essentially enters a plea of abatement. Our citizens, it says, may yet prove in some tribunal they are not criminals. Acquittal, of course, is always a possibility.

Appellants, California declares, "after payment of the tax, will be entitled to a trial *de novo* respecting the validity of the assessments in question". (Brief p. 3.)

Such a trial is a non-jury trial; a trial requiring the taxpayer to assume the burden of proof,[2] a burden requiring proof of individual and personal freedom from violation of the California Penal Code through a past period of four years; a trial available only after the prepayment of criminal fines and penalties so enormous as to frustrate access to the court on the part of those who can pay, and to forbid access on the part of those who cannot pay.

It is respectfully submitted that it is a clear denial of due process to relegate Appellants to such a refund action in order to vindicate their constitutional right to be free from the stigma of criminal guilt.

This is true because the right to be free from the stigma of criminal guilt (the presumption of innocence)

---

[2]California has successfully maintained that in tax refund actions involving assessments under Section 17297, the burden of proof in *Court* is upon the taxpayer and the refund action is not a jury trial. This contention is sustained on the theory that a refund action is a special statutory proceeding and the right to jury trial does not extend to such an action. Also, that the assessment and determination of the taxing officials are presumed to be correct; therefore, of course, the burden is upon the taxpayer. In *Hall v. Franchise Tax Board*, Superior Court of Sacramento County, No. 12952, (a refund action under Section 17297) the Attorney General summarizes his argument as follows:

"It is respectfully submitted that since the above entitled action is statutory only and plaintiffs have no common law remedy to recover a tax voluntarily paid, that there is no constitutional right to a jury trial in this case. Accordingly, defendant respectfully requests that the above entitled action be set for trial before the court, sitting without a jury.

Respectfully submitted,

STANLEY MOSK, Attorney General of the State of California

DAN KAUFMANN, Assistant Attorney General

EDWARD P. HOLLINGSHEAD, Deputy Attorney General

By EDWARD P. HOLLINGSHEAD

Attorneys for Defendant."

can not be measured in terms of money. Here, as in *Speiser v. Randall*, 357 U. S. 513, taxing officials purport to do no more than compute the amount of the taxpayer's monetary liability in accordance with customary taxing procedure. But in fact, they have undertaken to determine whether conduct is criminal. The ordinary proposed tax assessment creates a mere debt. Refund provides an adequate remedy. However, a refund action in this case involves more than the question of debt with its routine proof. It presents the formal issue of criminal guilt. The California Refund Action retains the burden of proof and the burden of coming forward with the evidence on the taxpayer. In a refund action, the administrative verdict of criminal guilt against the citizen persists. In a word, the criticisms which are properly directed against the statute in its administrative application are also justly directed at the judicial refund action. (*Poindexter v. Greenhow*, 114 U. S. 270.)

3. Federal Jurisdiction and the Procedural Aspects of the California Decision.

(a) The Withdrawal of All Judicial Remedies by Injunction, Writ of Mandate or Other Legal or Equitable Process.

California, by statute and constitutional provision, has denied to Appellants all judicial remedies by injunction, mandate, "or other legal or equitable process". Appellants, California says, now have only one remedy, the action for refund, after prepayment of the assessment.

The California Supreme Court, in the decision below, went on to review the local procedural rules governing issuance of the Writ of Prohibition. However, since

California has closed the door to all extraordinary relief, whether by mandamus, prohibition, certiorari, or injunction, local procedural rules governing issuance of the Writ of Prohibition in California, do not provide an adequate or independent basis of judgment so as to defeat federal jurisdiction. (*Wolfe v. North Carolina*, 364 U. S. 177, 185.) To state the proposition in another way, it is evident that California will not issue to Appellants an injunction, Writ of Mandate, Writ of Prohibition, Writ of Certiorari or any other extraordinary remedy or writ to protect or enforce the constitutional rights which they contend are *now* being impaired.

It should be noted in passing, however, that the availability and distinctions between the extraordinary writs in California has been the subject of long, amazing confusion and uncertainty.[3]

Also, it has been uniformally held that the California Courts will issue the appropriate extraordinary remedy, *i.e.*, mandate, injunction, certiorari, prohibition, depending upon the facts alleged in the Petition, and not upon the formal designation of the application.[4]

We reiterate that regardless of what procedural steps Appellants had taken, or what writ they had formally requested, California has taken the position that they are not *now* entitled to any form of judicial relief, except the California Refund Action. The effect of this decision, while cast in a procedural form, is to irrevocably deny now a substantial federal right of Appellant

---

[3]See the Article—*Certiorarified—Mandamus*, 2 Stanford Law Review, p. 285.

[4]3 Witkin, *California Procedure*, Page 2567. *Witkin* is the accepted authority on California practice and procedure. In Appendix A, we set forth an excerpt from Witkin on this point.

and such State action is in fact affirmance of the tax assessment and a ratification and approval of the multiple impairment, supression and deprivation of Appellants constitutional rights.

Poindexter v. Greenhow, 114 U. S. 270;
Wolfe v. North Carolina, 364 U. S. 177;
Lipke v. Lederer, 259 U. S. 557;
Kennedy v. Mendoza-Martinez, 9 L. Ed. 2d 644.

(b) The California Administrative Proceedings.

The Brief of the Attorney General emphasizes that Appellants have had an extensive administrative hearing before the State Board of Equalization.

California follows the customary rule that, before seeking judicial relief, one aggrieved by administrative action must endeavor to exhaust the administrative remedies.

Again we note, however, that it is clear from the decision of the California Supreme Court that whether or not Appellants had sought administrative relief, or exhausted the administrative remedies, they would not have been entitled to any immediate form of judicial redress, such as by mandamus, prohibition, injunction, but would be required in all events to pursue the statutory refund action. In the context of this case, *after the fact* administrative relief will not save the prior arbitrary deprivation of constitutional right.

Kennedy v. Mendoza-Martinez, 9 L. Ed. 2d 644;
Lipke v. Lederer, 259 U. S. 557;
Bantam Books v. Sullivan, 9 L. Ed. 2d 584;
Marcus v. Property Search Warrant, 367 U. S. 717;
Poindexter v. Greenhow, 114 U. S. 270.

While Appellants were not required to seek administrative relief (*Speiser v. Randall, supra*) they have in endeavoring to follow the California rule, futilly exhausted their administrative remedies, except for the *proforma* decision on their Petition for Rehearing to the State Board of Equalization. At all times at the administrative level they have protested that the entire assessment and proceedings impaired their constitutional rights under the U. S. Constitution.

The administrative proceedings serve only to emphasize the arbitrary nature of California's action.

At the administrative hearings, Appellants were asked to disprove unspecified criminal charges. Assertion of protection under the Fifth Amendment was construed against them. (See Appendix "D"—Jurisdictional Statement.)

The State Board of Equalization even refused to rule upon the question of who had the burden of proof.[5]

There was utter failure of proof to show *individual* responsibility for any criminal conduct. The only eye witness testimony presented, as to the manner in which the games were conducted, was the testimony of a Mr. Buchanan, who observed one game *on one day for 35 minutes.*[5a] (Proceedings before the State Board of Equalization, p. 130, line 4.)

The other evidence consisted of the opinion of an expert, who had never seen the games played.

---

[5]"Mr. Holden: The Board of Equalization has not made a determination of who has the burden of proof in any one of the cases arising under the illegal activities section." (Proceedings before the State Board of Equalization, p. 5.)

[5a]The assessments, of course, concerned a period of four years.

Many of the Appellants were mere joint venturers, investors or partners in the games and had not participated in the conduct of the games, or seen them played. There was no proof of individual participation of complicity on the part of any of the Appellants. It may be confidentially asserted, therefore, that by any standard there was no acceptable evidence established in the hearings before the State Board of Equalization or at the protest hearing before the Franchise Tax Board, that the Appellant taxpayers and each and all of them, for the four years involved in this case, were engaged in "illegal activities".

A criminal conviction which is not supported by acceptable or any evidence, is a denial of due process of law.

Thompson v. Louisville, 362 U. S. 199.

4. The Enormous Penalties Imposed in This Case.

In the case of the Appellants, Nathan and Ida Franklin, the assessments levied by administrative notice and approved by the State Board of Equalization are as follows:

Nathan and Ida Franklin	1951	12,839.70[6]
	1952	23,409.14
	1953	23,406.16
	1954	54,099.66
TOTAL		113,754.66[7]

[6]The 1951 assessment is smaller than the assessments for subsequent years. Section 17297 did not become effective until May 3, 1951. The Franchise Tax Board, in making the 1951 assessment, apparently prorated the assessment.

[7]See Opinion of the State Board of Equalization, Appendix to California's Brief.

There must be added to the Franklin assessment, six-percent interest which accrues from the date of assessment to the date of payment. As accrued to October 15, 1962, interest is in the sum of $57,714.21. The total assessment to that date, therefore, is $171,468.87.

As shown by Exhibit E to the Petition for Writ of Prohibition on file herein, the total net worth of the Franklins is the sum of $44,224.00, as of October 1, 1962.

While, as the Attorney General contends (Brief, p. 10) mere hardship is no defense to a tax assessment nor a defense to a refund action, it is evident that this case presents a levy passing beyond the bounds of hardship.

It is appropriation.

California argues that Appellants are given the same "procedural treatment" that is accorded to any businessman whose claim of a deduction of a business expense is "challenged" by the taxing agency. (Brief p. 10.) California further contends that some of the Appellants, after all, should have brought a "test case" in the California Courts, by paying a single assessment against one of the Appellants, some of which for certain years were less than $100.00. (Brief p. 10.)

It is clear, we think, that the summary denial of *all* deductions because of alleged criminality, is vastly different from the denial of specific deductions because of lack of proof of the validity of such deductions. It is fair enough to ask a taxpayer who claims deduction for rental to show proof of payment of rent—or of wages —or of repairs.

The assessment here bears no real similarity to such determination.

In the case of *The Black Out* and *Vogue, all* deductions were denied for the fiscal year 1953.[8] Those deductions included such routine business expenses as: Salaries & Wages, $104,844.44; Rent, $13,633.23; Pay Roll Taxes, $4,118.13;[9] City License, $1,002.00; Depreciation, $6,767.40;[10] Repairs, $2,650.70; Game Supplies, $1,720.75; Bad Checks—Cash Short, $1,148.08; Advertising, $661.04; Utilities and Telephone, $2,127.75; Professional Fees, $900.00; Patron Service, $6,230.74; Neon Signs, $252.00; Food, Smokes, etc. to patrons, $5,373.27; Insurance, $1,081.87; Janitor Supplies, $1,105.75; Miscellaneous Expense, $283.90.

The *ex parte* denial of all business expenses and the assessment of a tax upon gross receipts levied at the same rate as a tax imposed upon net income is necessarily arbitrary and void. (*Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550.)

The "test case" argument fails to mention the summary remedies California enjoys under its personal income tax law. These procedures include the right of jeopardy assessments and seizure. (*California Revenue & Taxation Code Section 18644, et. seq.*) Summary judicial judgments for the amount of the tax. (*Section 18861, et seq.*) Summary liens. (*Section 18881, et seq.*) Summary warrants having the force and effect of a Writ of Execution. (*Sections 18906 and 18907.*)

---

[8]Also, of course, for 1951, 1952 and 1954. The year 1953 is selected for illustration only.

[9]The denial of a deduction for Pay Roll Taxes presents a question of special federal interest.

[10]The denial of a deduction for depreciation is doubtful. *Doyle v. Mitchell*, 247 U. S. 1479; *Burnet v. Logan*, 283 U. S. 404.

Constitutional rights are not dependent upon the question of whether great or small sums are claimed to be due. Thus the *de minimus* argument was rejected in *Lipke v. Lederer*, 259 U. S. 557. In *Lipke*, this Court issued an injunction (notwithstanding anti-injunction statutes) against a tax penalty. It was noted in the dissenting opinion that the taxpayer there had the remedy of paying under protest and in bringing an action to recover the amount paid, which in that case was the sum of $557.29.

The availability in *Lipke* of a refund action to recover this modest sum was held to be no grounds for denying injunctive relief against imposition of a criminal penalty in the guise of a tax founded upon the secret findings of administrative officers that the taxpayer was guilty of a crime.

5. Reply to Other Contentions in the Brief.

California cites *Hetzel v. Franchise Tax Board*, 161 Cal. App. 2d 224, 326 P. 2d 611. In *Hetzel*, the taxpayer filed an income tax return reporting income as a bookmaker and deducting wagering losses; no deductions other than wagering losses were claimed in the return.

Hetzel is, therefore, a case where the taxpayer has, in effect, confessed the receipt of income within the ambit of Section 17297. The case is thus vastly different from the case here, where Appellants deny criminal guilt.

The case of *Tank Truck Rentals, Inc. v. Commissioner*, 356 U. S. 30, and similar cases, are readily distinguishable. In *Tank Truck Rentals*, deductibility of state fines was denied on the grounds that such payments were not "ordinary and necessary" expenses. It was admitted that the taxpayer had paid the fines; thus, there was no issue of criminal guilt.

Finally, certain obvious distinctions must here be noted. Assessments such as fraud assessments, designed to aid and assist the administration and enforcement of taxing laws, are, of course, not criminal penalties or sanctions. (*Helvering v. Mitchell,* 303 U. S. 391.)

Statutes which impose essentially civil penalties and are not explicitly conditioned upon the commission of a crime, are not comparable to Section 17297. The distinction is noted in *United States v. Sanchez,* 340 U. S. 42. Speaking of the distinction between the procedural rules required in imposing a civil penalty, as distinguished from those which pertain to the imposition of criminal penalty, this Court, in *Sanchez,* unanimously ruled: (p. 45)

> "The tax levied by Sec. 2590(a)(2) is *not conditioned upon the commission of a crime.* The tax is on the transfer of marijuana to a person who has not paid the special tax and registered. Such a transfer is not made an unlawful act under the statute. Liability for the payment of the tax rests primarily with the transferee; but if he fails to pay, then the transferor, as here, becomes liable. It is thus the failure of the transferee to pay the tax that gives rise to the liability of the transferor. *Since his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction.* The fact Congress provided civil procedure for collection indicates its intention that the tax be treated as such. Helvering v. Mitchell, 303 US 391, 82 L ed 917, 58 S Ct 630 (1938). *Moreover, the Government is seeking to collect the levy by a judicial proceed-*

ing with its attendant safeguards. Compare Lipke v. Lederer, 259 US 557, 66 L ed 1061, 42 S Ct 549 (1922); Tovar v. Jarecki, 173 F2d 449 (CA 7th Cir 1949)."

Similarly, in *Kahriger,* 345 U. S. 22, the statute required those engaged in wagering, to pay a ten-percent excise tax, and to register and pay a registration tax. The entire structure of the tax is civil in its nature and is not dependent upon proof of crime. As noted by this Court, "the wagering tax with which we are here concerned, applies to all persons engaged in the business of receiving wagers regardless of whether such activity violates state law." (p. 26.)

In *Lewis v. United States,* 348 U. S. 419 (Brief p. 13) "An information was filed in the Municipal Court of the District of Columbia charging the Petitioner with violation of 26 U. S. C. 3290 in that he engaged in the business of accepting wagers without paying the occupational tax imposed by that section." (p. 419.)

The traditional criminal proceeding, used in *Lewis,* is much different from the administrative verdict of guilt California seeks to sustain here.

The case here is ruled by *United States v. Constantine,* 296 U. S. 287, on the issue of penalty versus tax.

Several minor points perhaps should be noted. The reference to the Attorney General's Opinion (Brief p. 5, 17 Ops. Cal. Atty. Gen. 64) is inaccurate. The opinion of the Attorney General relates to a wholly different game. Furthermore, the opinion was rendered February 19, 1951; the statute involved here became effective May 3, 1951.

Reference to the action of the Chief of Police (p. 9) is inaccurate. His hesitancy was promptly restrained and enjoined by the Superior Court of Los Angeles County. (See p. 3, Petition for Writ of Prohibition.)

The Brief fails to note that in the decision of *Schur*, 47 Cal. 2d 11, the California Supreme Court in effect reinstated the findings of the City Council of the City of Santa Monica, that the games here involved were games predominantly of skill. The findings of the City Council were introduced by the Franchise Tax Board in the hearing before the State Board of Equalization, but were ignored. However, this does not alter the fact that the determination of the City Council was, as held in *Schur*, the determination of a quasi-judicial body having jurisdiction. The judgment of the Council never having been properly set aside or reversed, is therefore, still effective.

Conclusion.

An extensive search has revealed no case (and none has been cited by the Attorney General) in which an administrative decision that a crime has been committed has been upheld as the valid basis of a tax assessment or pretended tax assessment where there was neither an admission of guilt, as in *Hetzel*, nor a previous or concurrent adjudication by a court in a criminal proceeding, that a crime has been committed. A declaration that California's position is valid, would be a declaration that taxing officials may tax as criminal any conduct which it may choose to call criminal, despite denial of guilt, despite civil proceedings to the contrary, or despite the fact there has been no criminal proceedings adjudging guilt. If the taxing authorities are truly in-

dependent in determining what is criminal conduct, a tax for violation could be imposed even where the accused has been adjudged "not guilty" in a criminal proceeding. Such summary administrative verdict of criminal guilt is clearly contrary to the due process clause of the Fourteenth Amendment of the U. S. Constitution, and the withdrawal of all present remedies by California, to contest or challenge such administrative verdict of criminal guilt, is a clear and final denial of federal right.

This Court's jurisdiction in this momentous case is, therefore, clear.

Respectfully submitted,

THOMAS W. LESAGE,
Counsel for Appellants.

APPENDIX A.

Excerpt From 3 Witkin, California Procedure (Page 2567.)

It has been seen (*supra*, Sec. 13, *et seq.*) that the distinctions between the functions of the various extraordinary writs are not as clearly drawn as might be desired. In consequence it is sometimes difficult to determine which writ is appropriate to give the relief sought. A careful pleader who is aware of the uncertainties in this field will often state his prayer in alternative form; *e.g.*, for prohibition or mandamus, or prohibition or certiorari; or he may ask for two writs. (*Lankton v. Superior Court* (1936), 5 Cal. 2d 694, 55 P. 2d 1170; *Golden State Glass Corp. v. Superior Court* (1939), 13 Cal. 2d 384, 90 P. 2d 75; *Evans v. Superior Court* (1939), 14 Cal. 2d 563, 59 P. 2d 107.) If, however, by the label and prayer of his petition he seeks a writ to which he is not entitled, but nevertheless the petition contains allegations sufficient to justify the granting of a different writ, is he entitled to that writ?

A few decisions, which deny the privilege of changing from prohibition to certiorari, are explainable on their special facts: The complete record, including the evidence before the trial court, was not brought up, and a review of the judgment or order could not be had. (See *Davis v. Superior Court* (1925), 71 Cal. App. 646, 236 Pac. 151; *O'Brien v. Olson* (1941), 42 Cal. App. 2d 449, 458, 109 P. 2d 8; *cf. Donner Finance Co. v. Municipal Court* (1938), 28 Cal. App. 2d 112, 115, 81 P. 2d 1054 [additional reason stated that this was appeal from superior court judgment denying prohibition, and theory cannot be changed on appeal].) If

an adequate record is brought up with the petition for prohibition, the obstacle is overcome, and, where this is necessary for relief, the proceeding may be treated as one in certiorari. (See *infra*, Sec. 72.)

Apart from the narrow objection of the foregoing decisions, the cases uniformly follow the modern principle of pleading that neither mislabeling nor a defective prayer will bar relief justified by proper allegations and proof. (See *Van Hoosear v. R. R. Commission* (1922), 189 Cal. 228, 207 Pac. 903; *Swim v. Superior Court* (1924), 193 Cal. 539, 226 Pac. 2; *Board of Trustees v. State Board of Equalization* (1934), 1 Cal. 2d 784, 787, 37 P. 2d 84; *Sekt v. Superior Court* (1944), 24 Cal. 2d 73, 77, 147 P. 2d 568; *Boren v. State Personnel Board* (1951), 37 Cal. 2d 634, 638, 234 P. 2d 981; *cf. Hostetter v. Alderson* (1952), 38 Cal. 2d 499, 500, 241 P. 2d 230 [complaint for declaratory relief treated as petition for mandamus]; and see *infra*, Sec. 72.)

Sec. 72 Illustrations

The following cases, classified to indicate the nature of the mistaken choice, illustrate the principle set forth in the preceding section:

(a) *Mandamus Issued Though Petition Sought Certiorari.* (See *Traders Credit Corp. v. Superior Court* (1931), 111 Cal. App. 663, 296 Pac. 99; *Mash v. Superior Court* (1923), 192 Cal. 258, 259, 219 Pac. 742; *Board of Trustees v. State Board of Equalization* (1934), 1 Cal. 2d 784, 37 P. 2d 84.)

(b) *Mandamus Issued Though Petition Sought Prohibition.* (See *Fritz v. Superior Court* (1936), 18 Cal. App. 2d 232, 63 P. 2d 872; *Gromeeko v.*

Superior Court (1952), 114 Cal. App. 2d 754, 757, 251 P. 2d 29; *Schaefer v. Superior Court* (1952), 113 Cal. App. 2d 428, 439, 238 P. 2d 96; *Simmons v. Superior Court* (1950), 96 Cal. App. 2d 119, 132, 133, 214 P. 2d 844, *infra*, Sec. 77.)

(c) *Relief on Certiorari Granted Though Petition Sought Prohibition.* (See *Finn v. Butler* (1925), 195 Cal. 759, 765, 235 Pac. 992; *A. G. Col Co. v. Superior Court* (1925), 196 Cal. 604, 606, 238 Pac. 926; *Van Hooser v. R.R. Commission* (1922), 189 Cal. 228, 207 Pac. 903, *Traffic Truck Sales Co. v. Justice's Court* (1923), 192 Cal. 377, 220 Pac. 306, *infra*, Sec. 75.)

(d) *Relief on Certiorari Granted Though Petition Sought Mandamus.* (See *Walker v. San Gabriel* (1942), 20 Cal. 2d 879, 129 P. 2d 349, *supra*, Sec. 16; *cf. Sekt v. Superior Court* (1944), 24 Cal. 2d 73, 147 P. 2d 568, *infra*, Sec. 75.)

(e) *Prohibition Issued Though Petition Sought Mandamus.* (See *Hampton v. Superior Court* (1952), 38 Cal. 2d 652, 242 P. 2d 1 [to prevent retrial after reversal with directions to enter judgment]; *State Board of Equalization v. Superior Court* (1935), 5 Cal. App. 2d 374, 379, 42 P. 2d 1076.)

MICRO C

TRADE MA

PC 832

CARD 22

ARK ®

MATTHEW BENDER & COMPANY

MB

64-1

microcard